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No.

Supreme Court, U.S.
FILED

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Supreme Court of the United States

OFFICE OF THE CLERK

October Term, 1995

ROSEANN CLARK and JOSEPH CLARK, and INFANT NICHOLAS CLARK and MICHAEL CLARK, by their mother, ROSEANN CLARK,

Petitioners,

against

CLARKSTOWN CENTRAL SCHOOL DISTRICT, and HELEN O'CONNOR, individually and in her official capacity as an employee of the CLARKSTOWN CENTRAL SCHOOL DISTRICT, ARCHDIOCESE OF NEW YORK, ST. AUGUSTINE SCHOOL, HELEN BOYCHAK as Principal of St. Augustine School, and as employee of ARCHDIOCESE OF NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether the Writ of Certiorari should be granted where the Courts below entirely ignored the circumstance that Petitioners demonstrated that they had a constitutionally protected liberty interest, entitling them to be free from unreasonable and unwarranted child abuse investigations, and that this liberty interest was violated by the initiation of such the investigation without the necessary prerequisite of "reasonable cause" to suspect that Petitioners' children were abused.

Petitioners contend that this question should be answered in the affirmative.

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No.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ROSEANN CLARK AND JOSEPH CLARK, AND INFANT NICHOLAS CLARK AND MICHAEL CLARK, BY THEIR MOTHER, ROSEANN CLARK,

Petitioners,

against

CLARKSTOWN CENTRAL SCHOOL DISTRICT, AND HELEN O'CONNOR, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS AN EMPLOYEE OF THE CLARKSTOWN CENTRAL SCHOOL DISTRICT, ARCHDIOCESE OF NEW YORK, ST. AUGUSTINE SCHOOL, HELEN BOYCHAK AS PRINCIPAL OF ST. AUGUSTINE SCHOOL, AND AS EMPLOYEE OF ARCHDIOCESE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court to issue a Writ of Certiorari to review an Order of the United States Court of Appeals for the Second Circuit, dated October 13, 1995. A copy of the Order is set forth as Appendix A.

According to the Order, the Second Circuit affirmed a Judgment of the United States District Court for the Southern District of New York (Hon. CHARLES L. BRIEANT,

U.S.D.J.), dated January 31, 1995, which dismissed Petitioners' Complaint alleging that Respondents, singly and severally committed violations of 18 U.S.C. § 1983 and related State claims. A copy of the Judgment is set forth as Appendix B.

Petitioners contend that they have a constitutionally- protected privacy interest under the Ninth and Fourteenth Amendments to the United States Constitution which, as applies to this case, necessarily meant that they should have been found to be free from a child abuse investigation initiated and/or conducted by various of the Respondents.

Moreover, Petitioners submit that the District Court below erred as a matter of law in finding that any of the Respondents had "reasonable cause" to suspect that Petitioners' children were being abused. At the very least, when viewed in a light most favorable to the various Respondents, there were factual disputes as to the issues advanced in the case, the presence of which mandated denial of any motion for summary judgment. See F.R.C.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

While the Second Circuit, on appeal, appeared to acknowledge as correct Petitioners' contention that there exists a "constitutionally-protected liberty interest to be free from child abuse investigations absent 'reasonable cause' to believe that a child is being abused," the Second Circuit found that:

> [Respondent] O'Connor had reasonable cause to report her suspicions of child abuse to her immediate supervisor, [Respondent] Boychak, who then had similar cause to pass on the report to third-party defendant Child Protective Services.

Petitioners submit that the Second Circuit, most respectfully, was in error with respect to whether there existed "reasonable cause" for Respondent O'Connor to have reported her highly dubious suspicions to the Principal of St. Augustine School. Moreover, strictly speaking, Respondent Boychak, the school principal was not Respondent O'Connor's supervisor.

Respondent O'Connor, an employee of the Central School District, was not subordinated to the School, but was assigned as a school nurse to the school by operation of the State Education Law. Respondent O'Connor's immediate supervisor was someone in the main office of the Central School District. At the outset of this application, Petitioners point this error out to this Court as indicative of the need for this Court to review and revise the decision of the Courts below, and that by granting their petition for a Writ of Certiorari, this Court may issue instructions to the Courts below on the need to be sensitive to constitutionally protected liberty interests in child abuse investigations.

Opinions Below

The Order of Court of Appeals which is set forth as Appendix A contains the reasoning of that Court.

The Judgment of the District Court is set forth as Appendix B. The District Court did not file a written opinion.

Jurisdiction

The Order of affirmance in the Court of Appeals was entered on October 13, 1995. According to Rule 13.4 of the United States Supreme Court Rules, this Petition for a Writ of Certiorari, having been filed within 90 days of October 13, 1995, is

timely. Further, this Court's jurisdiction to review this case rests upon 28 U.S.C. § 1254(1).

Statutory Provisions Involved

42 United States Code § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of Case

Petitioners Joseph and Roseann Clark are the parents of two children, Nicholas and Michael. The two children, at all times relevant to this controversy, attended the St. Augustine School, operated by Respondent Archdiocese of New York. Respondent Helen O'Connor was employed by Respondent Clarkstown Central School District as a school nurse, and assigned permanently in that capacity to Respondent St. Augustine School.

On or about September 16, 1991, Respondent O'Connor questioned young Nicholas Clark concerning a black eye. Nicholas told Respondent O'Connor that he sustained the injury while playing football with relatives and a friend while attending a

party on the previous weekend. Respondent O'Connor believed that she remembered that Nicholas' brother Michael had a black eye on April 4, 1991. She seemed to recall that young Michael Clark had told her at the time that he had received the black eye while playing with his cousins from Staten Island. Respondent O'Connor also remembered that on or about June 21, 1991, Michael's teacher had told her that Michael had a handprint on his face. This "remembering" was revealed long after the case had been commenced, during the discovery process. Respondent O'Connor had not actually seen the handprint.

Based solely upon the above, Respondent O'Connor concluded that young Nicholas had been the victim of child abuse and reported her suspicions to the Principal of St. Augustine School, Respondent Helen Boychak. On the following day, September 16, 1991, Respondent Boychak spoke separately with Nicholas Clark and Michael Clark. She advised Respondent O'Connor that both children had stated to her that Nicholas had received the black eye in a football game. At this, neither individual Respondent took any further action on September 16, 1991.

On the following day, September 17, 1991, Respondent O'Connor again approached Respondent Boychak and told her that she "could not rest unless something was done" with respect to the Clark children. Based on this prodding, Respondent Boychak, in the presence of Respondent O'Connor, made a report of official child abuse to Third-party Defendant Department of Social Services, Child Protective Services (hereafter CPS). In the report, Petitioners were directly accused of child abuse.

CPS conducted an investigation of Petitioners' family. An investigator from the agency interviewed both Michael Clark and Nicholas Clark and questioned them about intimate details

of their family. The investigator also examined and took pictures of Nicholas Clark's black eye. Petitioners, themselves, were interviewed by the investigator of CPS and asked intimate details concerning their family life.

At the conclusion of the investigation by CPS, it was determined that the report made by Respondent Boychak at the insistence of Respondent O'Connor was unfounded.

Petitioners were substantially harmed by the unfounded reports of child abuse on the part of Respondents. Petitioners filed a Complaint on or about December 14, 1992 in the Southern District of New York against Respondents Clarkstown Central School District and Helen O'Connor. In the Verified Complaint, Petitioners brought a civil rights action pursuant to 42 U.S.C. § 1983, which also contained pendent state law claims. Jurisdiction over the federal claims was said to exist pursuant to 28 U.S.C. §§ 1331 and 1343(3).

In the Complaint it was alleged that the child abuse investigation of Petitioners was conducted by Respondents in bad faith and with wanton disregard of the rights of Petitioners under both the Federal and New York State Constitutions, as well as the common law of the State of New York.

The basis of the federal claims against Respondents School District and O'Connor were that engaging in a course of conduct to the detriment of Petitioners and their sons, without probable cause and/or reasonable suspicion, and without the benefit of a search warrant, the Respondents, while acting in concert and acting under the color of law, and pursuant to official policy, violated the reasonable expectation of privacy as protected by the Fourth, Fifth, Ninth and Fourteenth Amendments to the U.S. Constitution. Essentially, it was contended by Petitioners that

Respondents, by their invasive behavior, had conducted an illegal search and seizure, thereby causing all Petitioners severe injuries and damages. Respondents' course of conduct also gave rise to a variety of pendent state law claims.

Respondent School District was said to be liable to Petitioners for the conduct of Respondent O'Connor, both directly and under the doctrine of *respondeat superior*. Respondent School District was said to have failed to have properly supervise the actions of its employee, Respondent O'Connor.

On or about April 15, 1993, Respondent School District filed a Third-Party Complaint against Respondent Archdiocese of New York, the St. Augustine School, Helen Boychak, as Principal of the School and employee of the Archdiocese, as well as Third-Party Defendants State of New York, County of Rockland, the Department of Social Services and the Child Protective Services. It should be noted that, subsequently, the Third-Party Defendants State of New York, County of Rockland, the Department of Social Services and the Child Protective Services were separated from this action. Said Third-Party Defendants are no longer part of this controversy.

A period of discovery and deposition taking occurred, during the course of which the following motions were made. On or about August 5, 1994, Respondents Archdiocese, St. Augustine School and Helen Boychak filed a Motion for Summary Judgment requesting the Third-Party Complaint be dismissed against them, together with any cross-claims and counter-claims.

On or about October 4, 1994, Respondent Helen O'Connor filed a Motion for Summary Judgment requesting dismissal of the Verified Complaint and any and all counter-claims and cross-claims against her. On or about October 6, 1994, Respon-

dent School District filed a Motion for Summary Judgment requesting dismissal of the Verified Complaint and any and all counter-claims and cross-claims against it.

Petitioners duly opposed the various motions brought by all of the Respondents and the matter was set down for argument on January 27, 1995 before the Honorable CHARLES L. BRIEANT, District Court Judge. On that date, after hearing arguments from all sides, the Court below orally granted Respondents' Motions for Summary Judgment and dismissed all federal claims against Respondents with prejudice and dismissed the pendent state claims against Respondents without prejudice. A written Order was entered in the Office of the Clerk of the Southern District on January 31, 1995.

Petitioners appealed to the United States Court of Appeals, Second Circuit. There, the judgment was affirmed by Order dated October 13, 1995. The Second Circuit held that the granting of summary judgment to Respondents was correct because of its belief that Respondents' actions were not unreasonable under the circumstances.

Petitioners cannot agree with this decision, and they maintain that the record of this case clearly indicates that there was not "reasonable cause" to believe that their children were abused. Given the very intrusiveness of Respondents' conduct, Petitioners now move for relief before this Court.

REASON FOR GRANTING THE PETITION

I. The Writ of Certiorari should be granted where the Courts below entirely ignored the circumstance that Petitioners demonstrated that they had a constitutionally protected liberty interest, entitling them to be free from unreasonable and unwarranted child abuse investigations, and that this liberty interest was violated by the initiation of such the investigation without the necessary prerequisite of "reasonable cause" to suspect that Petitioners' children were abused.

Petitioners submit that this Court should grant the present Petition for a Writ of Certiorari. They submit that both the Courts below so totally misconstrued Petitioners' constitutionally protected privacy interests under the Ninth and Fourteenth Amendments that only a decision by this Court on the merits would serve to remedy the misstatement of the body of the law on point.

The Court of Appeals below, for example, stated that it agreed with Petitioners as to the fact that they had such a constitutionally protected privacy interest but then completely vitiated the concept by stating that Respondents did have the "reasonable cause" to have acted, despite a clear absence of reasonable cause in the record to suspect that Petitioners' children were so abused. The Court of Appeals stated the following in its opinion:

> According to the [petitioners'] version of the facts, on or about September 16, 1991, O'Connor, a nurse at St. Augustine School, questioned Nicholas Clark, a student at that school, about his black eye. O'Connor seemed to recall that Michael, another of the Clark children, had a

> black eye on April 4 of the same year. She also remembered that on or about June 21 of that year, Michael's teacher had told her that Michael had a handprint on his face. Based on these observations and recollections, O'Connor reported her suspicions of child abuse to [Respondent] Boychak. After speaking separately to the two children -- conversations that yielded no evidence of child abuse -- Boychak made an official report of child abuse to Child Protective Services.

Petitioners submit that an examination of the record in this case reveals that the factual statements contained in the above-cited paragraph cannot be said to have been "[Petitioners'] version of the facts." Respondent O'Connor did not have all of the factual statements mentioned in the above excerpt of the Court of Appeals' decision at her disposal when she decided to make her official report to Child Protective Services. Indeed, many of the Respondent O'Connor's allegations were not only obtained long after her initial complaint, but were also entirely inaccurate.

For example, although she claimed to the contrary, when Respondent O'Connor first made her complaint, she was unaware what Petitioners would refer to as the "handprint" allegation. This allegation, if true, was a significant observation. Respondent O'Connor advanced the claim that Michael Clark's teacher had supposedly observed the handprint on June 21, 1991.

Respondent O'Connor found about the supposed handprint at a date far later than the date she made her complaint, a circumstance which eliminated the "handprint" as a factor to be considered in reckoning whether Respondent O'Connor had

"reasonable cause" to believe that the Clark children were suffering from child abuse.

However, in the record of the case, neither Michael nor Nicholas Clark were ever seen by any teacher to have a "hand-print" on their persons. The teacher supposedly making the allegation, Mrs. Burrill, had never had any contact with either Michael or Nicholas; she had been the teacher of the eldest brother of Michael and Nicholas, Joseph, Jr., several years before.

As to the claim that Michael Clark, the second brother, supposedly had a black eye on April 4, it is clear that at the time that Respondent O'Connor made her complaint, she had no recollection of this occurrence, if it indeed occurred. This Court should be aware that all of the alleged events concerning previous injuries to the Clark children were subsequently manufactured by Respondent O'Connor or by personnel at the school -- her friends -- in order to provide for justification for her baseless allegations against Petitioners. That this is so can be seen even from the cited portion of the Order of the Court of Appeals, which, on its face, appears to suggest the lack of "reasonable cause" in Respondent O'Connor's action, rather than its presence.

The Court of Appeals further stated in its decision as follows:

> Drawing all favorable inferences in favor of the appellants, we cannot say that this conduct was unreasonable. The events must be viewed at the time the investigation was initiated, not after the negative results of the investigation were known. Had an investigation not been undertaken and actual abuse followed, [Respondents] would have received justifiable criticism, if

> not a lawsuit, for not heeding evident warning signs. Persons charged with the responsibility of noticing and reporting signs of child abuse need not await confirmation of abuse by possible victims who may fear retaliation for revealing the true cause of bruises or other injuries.

While it is true that in cases such as the present one events must be viewed as they were at the time the investigation was initiated, rather than after the investigation was concluded with negative findings, here, the events at the initiation of the investigation were insufficient to meet the "reasonable cause" requirement. See *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989); *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994).

The observations made by Respondent O'Connor were simply insufficient to constitute "reasonable cause." Her observation of young Nicholas Clark gave rise to nothing more than an unparticularized hunch that something might be amiss in Petitioners' family. It was only later, after Petitioners' family was reported to the authorities, that the handprint on Nicholas' brother was recalled (although which brother was affected here and when the observation was made is not clear). In addition, the record is not clear when Respondent O'Connor became aware of the black eye allegedly sustained by Nicholas' brother, Michael.

To further demonstrate the lack of justification for the complaint made by Respondent O'Connor, it should be restated that from the facts of this case, when Respondent O'Connor supposedly reached her "conclusions" that the children in Petitioners' family may have been abused, the children were sent home to the supposedly abusive parents. This last action, that

of sending the Clark children home, demonstrates the baselessness of the complaint made by Respondent O'Connor. If Respondents O'Connor were a "person charged with the responsibility of noticing and reporting signs of child abuse," she certainly forsook her duty, if she was sincere in her suspicions, when she permitted the children to return home.

This permitting of the Clark children to go home is a far cry from "heeding evident warning signs," and "await[ing] confirmation of abuse by possible victims who may fear retaliation for revealing the true cause of bruises or other injuries." Not only did Respondent O'Connor permit the Clark children to be sent home, she waited 24 hours before raising the issue of the child abuse. Clearly, these circumstances render highly dubious Respondent O'Connor's allegations of child abuse on the part of the adult Petitioners. Respondent O'Connor's actions, in this light, were clearly violative of Petitioners' constitutional rights. Compare New York Social Services Law § 413.

At this juncture, another point needs to be made. Respondents were not content to merely make allegations against Petitioners which caused the invasion of their privacy. In addition, Respondents made public the fact that the allegations were made. Within a week of Respondent O'Connor's complaint, the entire community in which Petitioners lived knew of the allegations made against them and accepted their truth at face value. Neighbors became aware of the existence of the allegations, and Petitioners suffered accordingly.

Worse, the allegations made their way to Petitioner Joseph Clark's employment in the Town of Clarkstown Police Department, which caused him to become the subject of an official internal Departmental investigation. Among other indignities, Petitioner Joseph Clark was called before the Chief of Police

and compelled to answer questions concerning the allegations in this case in an official interview. Thus, there was a needless and unnecessary probe of Petitioners' private lives by the Police Department as Petitioner Joseph Clark's employer.

Moreover, Petitioner Joseph Clark's employment, itself, suffered. When he made arrests, attorneys for the persons arrested would cross-examine said Petitioner concerning the child abuse allegations, in attempts to damage Petitioners' credibility. Therefore, the illegal disclosure of the allegations in this case caused Petitioners to suffer severe damages which should have been addressed in the Courts below, which they were not.

Petitioners' constitutionally protected liberty interest arises from two separate sources, the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment on the one hand, and the statutory scheme established by the State of New York to protect the privacy rights of the family on the other. First, Petitioners have a constitutionally protected liberty interest of privacy provided by the Ninth Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution.

Moreover, it is established Constitutional law that a family has a protected liberty interest in its own integrity as a family. This is especially so when allegations arise implicating family members in accusations of child abuse. *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990); *Policard v. Brettschneider*, 1991 WL 87326 (E.D.N.Y.). This protected liberty interest as far as privacy is concerned must be upheld in all except very exceptional cases, where actual instances of abusive behavior exist. See *Emrik v. Chemung County Dept. of Social Serv.*, 911 F.2d 863, 865 (2d Cir. 1990).

Clearly, this protected liberty interest is a "private realm of family life [into] which the State cannot enter." In balancing the individual right with the state interest, a governmental agency in the position of Respondent Clarkstown Central School District must be sensitive to the existence of this "private realm." In *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944) at p. 161, this Court said the following:

> The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.' *Parham* [*v. J.R. et al.*, 442 U.S. 584 (1979)2] at 603. We have long held that there exists a 'private realm of family life which the state cannot enter.

The individual, or more correctly stated, the individual family is entitled to appropriate treatment by a governmental agency in questions which relate to family relations. Where allegations are made against an individual or an individual family in this context, due process rights of both a substantive and a procedural nature attach to them, which the government may not ignore. See *Emrik v. Chemung County Dept. of Social Serv.*, *supra*.

The Courts below appeared to have accepted the proposition that Petitioners have no liberty interest to be free from unreasonable, arbitrary or unwarranted child abuse investigations. This is clearly in violation of Petitioners' established and constitutionally protected liberty interests, which standing alone, ought cause this Court to grant Petitioners' instant application. *Parham v. J.R. et al.*, 442 U.S. 584 (1979).

Second, Petitioners have a constitutionally protected liberty interest in privacy provided by the New York statutory scheme. In *Hewitt v. Helms*, 459 U.S. 460 (1983), this Court, in recognizing that the states may provide for a statutory scheme in protecting liberty interests in privacy, stated as follows:

> Liberty interests protected by the Fourteenth Amendment may arise from two sources--the Due Process Clause itself *and the laws of the States. Meachum v. Fano*, 427 U.S. 215 at 223-227 (1976).
>
> * * *
>
> [A] State may create a liberty interest protected by the Due Process Clause *through enactment of certain statutory or regulatory measures.* [emphasis added]

Petitioners further submit that there is a New York State statute which requires the reporting of child abuse, New York Social Service Law (SSL) § 413. The section creates a constitutionally protected liberty interest of privacy to be free from arbitrary, unreasonable and unwarranted child abuse investigations. SSL § 413 provides in pertinent part:

> 1. The following persons and officials are required to report or cause a report to be made in accordance with this title when they have *reasonable cause* to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child, or when they have *reasonable cause* to suspect that a child is an abused or maltreated child where the parent, guardian, custodian or other person legally responsible for such child comes before them in their professional or official capacity and states from personal knowledge

> facts conditions or circumstances which, if correct, would render the child an abused or maltreated child. [emphasis added]

New York SSL § 413 clearly requires that "reasonable cause" that a child is an abused exist, prior to a report of suspected child abuse being made. Thus, before a report of suspected child abuse is made, or caused to be made, the objective criteria of "reasonable cause" must be satisfied. In essence, the New York State legislature has statutorily created a liberty right to privacy from child abuse investigations unless there is reasonable cause to invade this privacy. This liberty right is constitutionally protected by the Due Process Clause of the Fourteenth Amendment. The inclusion of a "reasonable cause" requirement in the statute could only have been done, specifically, to protect the liberty right to privacy to be free from arbitrary, unreasonable and unwarranted child abuse investigations.

In *Hall v. Davis*, 424 U.S. 693 (1976), this Court recognized:

> There exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law [footnote omitted], and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. *Paul v. Davis*, 424 U.S. 693, (1976) at 710-11.

In the record before the Courts below, there was no definitive showing that the action taken by Respondent Clarkstown

Central School District had the prerequisite predicate of "reasonable cause." Petitioners' constitutionally protected liberty right was violated due to an arbitrary, unreasonable and unwarranted report of suspected child abuse by Respondent O'Connor, an employee of Respondent Clarkstown Central School District.

In *Kentucky Department of Corrections v. Thompson, supra*, this Court stated as follows:

> To formulate a claim under the Due Process Clause of the Fourteenth Amendment, a plaintiff must demonstrate that he or she possesses a constitutionally protected interest in life, liberty, or property, and that state action has deprived him or her of that interest. See, U.S. Const. amend. XIV, Section 1. The Supreme Court has established that '[W]e examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.

Any rational analysis of the record in this case demonstrates that Petitioners had a constitutionally protected liberty interest of privacy to be free from arbitrary, unreasonable and unwarranted child abuse investigations. The initiation of the child abuse investigation by Respondent O'Connor, without an objectively reasonable basis to believe that child abuse had occurred, and, without "reasonable cause" to believe child abuse had occurred, violated those liberty interests of Petitioners without due process of law. In this instance, due process can only be satisfied, if there is an objectively reasonable basis to

believe that child abuse occurred and "reasonable cause" exists to believe that child abuse occurred.

It is undisputed that Respondent O'Connor was the person solely responsible for causing a baseless of suspected child abuse to be made against Respondents. It is also undisputed that this report of suspected child abuse caused Petitioners to be subjected to a child abuse investigation by CPS. Therefore, it would be fair to state that Respondent O'Connor had no "reasonable cause" to believe that a Clark child was an abused child and clearly violated Petitioners' protected liberty interest in being free from arbitrary, unreasonable and unwarranted child abuse investigations, without due process of law. *See Valmonte v. Bane, supra.*

Even a superficial analysis of the record in this case would reveal that even if viewed in a light most favorable to Petitioners, a genuine issue of material fact existed as to whether or not Respondent O'Connor had an objectively reasonable basis to believe that one of Petitioners' children was abused. Furthermore, it is possible that a genuine issue of material fact existed as to whether or not it was clear that the actions she took violated one of Respondents' established constitutional rights.

All of this necessarily meant that the granting of summary judgment to Respondents was quite inappropriate. See *Schering Corp v. Home Insurance Co.*, 712 F.2d 4 (2d Cir. 1983). A rational review of the record in this case would reveal that it cannot be found as a matter of law that Respondent O'Connor had the "reasonable cause" required under New York SSL § 413 to suspect that Petitioners' children were abused within the meaning of the statute.

Moreover, summary judgment was not an appropriate method of resolving the controversy before the Court below where a sufficient quantum of evidence was adduced to establish that there was a direct relationship between the violation of Petitioners' constitutionally protected liberty interests and the policies, procedures and practices of Respondent Clarkstown Central School District.

There were several substantial deficiencies in the policy, procedures and training program on child abuse identification and reporting employed by Respondent School District. These included the following:

1. There was a complete omission of the requirement that the district employee making the report must have an objectively reasonable basis to make such a report.
2. There was a complete omission of any reference to the individual's clearly established right to be free from invasions of privacy due to arbitrary, unreasonable and unwarranted child abuse investigations.
3. There was a complete omission of any reference to the individual's clearly established right to be free from invasions of privacy due to child abuse investigations unless there was "reasonable cause" to suspect child abuse.
4. There was a complete omission of any definition of the concept of "reasonable cause" as it was required to exist prior to a report of suspected child abuse to Respondent Clarkstown Central School District.

In fact, the very term "reasonable cause" is mentioned in only two places within the policy, procedures and training program on child abuse identification and reporting. The first place where the term "reasonable cause" is mentioned, is within an

appendix of the New York State Syllabus, where an actual copy of New York Social Service Law (SSL), Section 413, is provided. There exists no further explanation or definition of the term aside from its mere mention within the statute, in its inchoate form.

The second place where the term "reasonable cause" is a mere passing reference within the policy document. There, the term is again mentioned without any further explanation. Therefore, it becomes apparent that the documents generated by Respondent Clarkstown Central School District fail to instruct, let alone emphasize, that in the absence of an objectively reasonable basis, or in the absence of "reasonable cause", a family's right to privacy is protected by statute and the Constitution.

It can fairly be said that it is the policy, procedure and practice of the Respondent School District to omit instructing its employees on the constitutionally protected liberty interests that are implicated in situations that may require a report of suspected child abuse. It is also fair to say that the policy, procedure and practice of Respondent School District in failing to instruct its employees on the aforesaid constitutionally protected liberty interest resulted in the complained of constitutional violations.

A municipality or municipal agency may be held liable pursuant to 42 U.S.C. § 1983 for action caused by an official agency policy or practice which resulted in the violation of a plaintiff's constitutional rights. *Monell v. Department of Social Service*, 436 U.S. 658, 691-94, (1978); *Hodge v. Ruperto*, 739 F.Supp. 873 (S.D.N.Y. 1990). A municipality may also be liable under § 1983 due to its failure to train its subordinates if the need for further training is "obvious" to prevent constitutional violations. *Canton v. Harris*, 489 U.S. 378 (1989).

In addition, liability under § 1983 may be found where there is a policy of deliberate indifference to the constitutional rights of persons within its domain. *Fiacco v. City Rensselaer*, 783 F. 2d 319 (2nd Cir. 1986). A policy that permits or tolerates unconstitutional acts by municipal employees can form a basis for municipal liability under §1983. *Fiacco*, at 326-327. As shown above, Respondent School District, in promulgating its policy, procedure and training in child abuse identification and reporting was clearly deficient in that said Respondent completely omitted any training in the protected constitutional liberty interest that might be implicated in child abuse identification and reporting.

Finally, it is submitted that the Courts below erred in granting and affirming summary judgment against Petitioners where there was a genuine issue of material fact which should have been submitted to a jury, namely, that whether Respondent O'Connor's report was the result of willful misconduct and/or gross negligence. If the trial jury were to have found this, such a finding would have precluded, as a matter of law, the presumption of good faith and consequent immunity from civil liability provided by New York Social Services law § 419. *Satler v. Larsen*, 131 A.D.2d 125 (2d Dept. 1987).

However, this immunity only comes into effect if the civil liability did not result from intentional misconduct or gross negligence. SSL § 419; *Rossignol v. Silvernail*, 185 A.D.2d 497 (3d Dept. 1992). In this case, there is ample evidence to demonstrate that the report of suspected child abuse made by Respondent O'Connor was either willful misconduct and/or gross negligence. The state of the record below demonstrated that the actual making of the report of suspected child abuse by Respondent O'Connor was not predicated upon "reasonable

cause." Compare *Thomas v. Beth Israel Hospital Inc.*, 710 F. Supp. 935 (S.D.N.Y. 1989).

Indeed, a rational analysis of the facts as they existed before the District Court below, would reveal that Respondent O'Connor, in making a report of suspected child abuse, supposedly by Petitioners, was not based upon information which was objectively reasonable. Thus, her actions were objectively unreasonable and amounted to willful misconduct and/or gross negligence. Contrast, *Kempster v. Child Protective Services of Suffolk Co.*, 130 A.D.2d 623 (2d Dept. 1987).

In addition, Respondent O'Connor's actions, in making the complaint against the Petitioners, gross violations of the identification and reporting procedures by Respondent School District occurred. This, in and of itself, constituted either gross negligence and/or willful misconduct on the part of Respondent O'Connor. Compare *Viscaino v. City of New York*, 150 A.D.2d 312 (1st Dept. 1989).

Based on all of the above, it is submitted that this Court should grant the present application. Clear error was committed by the Courts below, and the error which was thus created serves to create a disharmony in the body of law as it pertains to constitutional rights to privacy and the freedom to be spared unreasonable and unwarranted governmental investigations.

Conclusion

For the reasons stated above, it is respectfully requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A—Order of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of October, one thousand nine hundred and ninety-five.

Present:

Honorable Ralph K. Winter,
Honorable Dennis G. Jacobs,
Honorable Pierre N. Leval,
Circuit Judges.

ROSEANN CLARK, JOSEPH CLARK, and infant NICHOLAS CLARK and MICHAEL CLARK, by their mother Roseann Clark,

Plaintiffs-Appellants,

v.

CLARKSTOWN CENTRAL SCHOOL DISTRICT,

Defendant-Third-Party-Plaintiff-Appellee,

HELEN O'CONNOR, individually and in her official capacity as an employee of the Clarkstown Central School District,

Defendant-Appellee,

ARCHDIOCESE OF NEW YORK, ST. AUGUSTINE SCHOOL, and HELEN BOYCHAK, as principal of St. Augustine School, and as an employee of the Archdiocese of New York,

Third-Party-Defendants-Appellees,

STATE OF NEW YORK, COUNTY OF ROCKLAND, DEPARTMENT OF SOCIAL SERVICES, and CHILD PROTECTIVE SERVICES,

Third-Party-Defendants.

ORDER
#95-7238

Appeal from the United States District Court for the Southern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Various members of the Clark family appeal from Judge Brieant's grant of summary judgment and dismissal of their complaint alleging violations of 18 U.S.C. § 1983 and related state claims. On appeal, they argue, *inter alia,* that they had a constitutionally protected privacy interest under the Ninth and Fourteenth Amendments to be free from a child abuse investigation initiated or conducted by various appellees. Appellants also argue that the district court erred as a matter of law in finding that appellees had "reasonable cause" to suspect that the Clark children were being abused.

We review a district court's grant of summary judgment *de novo*, viewing all evidence in the light most favorable to the party opposing the motion. *United States v. Articles of Banned Hazardous Substances,* 34 F.3d 91, 96 (2d Cir. 1994) (citation omitted). Summary judgment may be granted only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986). "A dispute regarding a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Keywell Corp. v. Weinstein,* 33 F.3d 159, 163 (2d Cir. 1994) (quoting *Anderson v. Liberty Lobby, Inc.,*477 U.S. 242, 248 (1986)).

We may assume that appellants are correct that they have a constitutionally protected liberty interest to be free from child abuse investigations absent "reasonable cause" to believe that a child is being abused. We nevertheless believe that O'Connor had reasonable cause to report her suspicions of child abuse to her immediate supervisor, appellee Boychak, who then had similar cause to pass on the report to third-party defendant Child Protective Services.

According to the appellant's version of the facts, on or about September 16, 1991, O'Connor, a nurse at St. Augustine School, questioned Nicholas Clark, a student at that school, about his

black eye. O'Connor seemed to recall that Michael, another of the Clark children, had a black eye on April 4 of the same year. She also remembered that on or about June 21 of that year, Michael's teacher had told her that Michael had a handprint on his face. Based on these observations and recollections, O'Connor reported her suspicions of child abuse to appellee Boychak. After speaking separately to the two children—conversations that yielded no evidence of child abuse—Boychak made an official report of child abuse to Child Protective Services.

Drawing all favorable inferences in favor of the appellants, we cannot say that this conduct was unreasonable. The events must be viewed at the time the investigation was initiated, not after the negative results of the investigation were known. Had an investigation not been undertaken and actual abuse followed, appellees would have received justifiable criticism, if not a lawsuit, for not heeding evident warning signs. Persons charged with the responsibility of noticing and reporting signs of child abuse need not await confirmation of abuse by possible victims who may fear retaliation for revealing the true cause of bruises or other injuries.

Because appellees' actions did not violate appellants' constitutional rights, the district court properly granted summary judgment, and we need not address appellants' remaining arguments.

We therefore affirm.

s/Ralph K. Winter
Hon Ralph K. Winter, U.S.C.J.

s/Dennis G. Jacobs
Hon. Dennis G. Jacobs, U.S.C.J.

s/Pierre N. Leval
Hon. Pierre N. Leval, U.S.C.J.

United States Court of Appeals
Second Circuit
Filed Oct 13 1995
George Lange III, Clerk

APPENDIX B—Order of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Roseann Clark and Joseph Clark, and infant Nicholas Clark and Michael Clark, by their mother Roseann Clark,

Plaintiffs,

against

Clarkstown Central School District and Helen O'Connor, individually and in her official capacity as an employee of the Clarkstown Central School District,

Defendants.

Clarkstown Central School District,

Third Party Plaintiff,

against

Archdiocese of New York, St. Augustine School, Helen Boychak as Principal of St. Augustine School, and as an employee of the Archdiocese of New York, and State of New York, County of Rockland, Department of Social Services, Child Protective Services,

Third Party Defendants.

92 CIVIL 9015 (CLB)
JUDGMENT

Whereas the above entitled action having been assigned to the Honorable Charles L. Brieant, U.S.D.J., and the Court thereafter on January 27, 1995, having handed down its oral order, granting defendants' motion for summary judgment, and dismissing all federal claims against all remaining defendants and third part defendants with prejudice and dismissing the pendent state claims against these defendants and third party defendants without prejudice, and denying defendant Helen O'Connor's motion for sanctions, it is,

ORDERED, ADJUDGED AND DECREED: That all federal claims against all remaining defendants be and hereby are dismissed with prejudice, and it is further,

ORDERED, ADJUDGED AND DECREED: That the pendent state claims against these defendants be and hereby are dismissed without prejudice.

Dated: White Plains, New York
January 31, 1995

s/James M. Parkeson
Clerk

No. 95-1146

Supreme Court, U.S.
FILED
1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

ROSEANN CLARK and JOSEPH CLARK, and INFANT NICHOLAS CLARK and MICHAEL CLARK, by their mother, ROSEANN CLARK,

Petitioners,

vs.

CLARKSTOWN CENTRAL SCHOOL DISTRICT, and HELEN O'CONNOR, individually and in her official capacity as an employee of the CLARKSTOWN CENTRAL SCHOOL DISTRICT, ARCHDIOCESE OF NEW YORK, ST. AUGUSTINE SCHOOL, HELEN BOYCHAK as Principal of St. Augustine School, and as employee of ARCHDIOCESE OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ARCHDIOCESE OF NEW YORK, ST. AUGUSTINE SCHOOL AND HELEN BOYCHAK AS PRINCIPAL OF ST. AUGUSTINE SCHOOL, AND AS EMPLOYEE OF ARCHDIOCESE OF NEW YORK

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QUESTION PRESENTED

Whether the Writ for Certiorari should be denied where the courts below found that Respondents had reasonable cause to believe that infant Petitioners were the victims of child abuse and that the subsequent investigation of Petitioners did not violate any of Petitioners' constitutional rights.

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OPINIONS BELOW

Petitioners, Mr. and Mrs. Clark and their children, Nicholas and Michael Clark, appealed from a judgment of the United States District Court, Southern District of New York. On January 31, 1995, the Honorable Charles L. Brieant, the United States District Judge at the United States District Court for the Southern District of New York, entered an order which granted Respondents' motion for Summary Judgment and dismissed all Federal claims against all Respondents with prejudice, and dismissed the pendent state claims against all Respondents without prejudice.

The United States Court of Appeals for the Second Circuit entered an Order on October 13, 1995, which denied Petitioners' appeal and found that Respondents, having had reasonable cause to believe that Nicholas and Michael Clark were being physically abused by Mr. and Mrs. Clark, did not violate Petitioners' constitutional rights.

The Order and reasoning of the Court of Appeals is set forth in Appendix A of Petitioners' Petition to this Court.

The Judgment of the District Court is set forth in Appendix B of Petitioners' Petition to this Court.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

On September 16, 1993, Respondent Sister Helen Boychak ("Sister Helen"), principal of St. Augustine School where infant Petitioners Nicholas and Michael Clark were students, reported a suspected case of child abuse involving the infant Petitioners to the Child Protection Services ("C.P.S."). Sister Helen made

the report because: (1) of information provided by Respondent Helen O'Connor ("Nurse O'Connor"), the school nurse and an employee of Respondent Clarkstown Central School District ("School District"), that abuse had occurred; and (2) of her own training on the procedure to follow when evidence of abuse is presented.

Nurse O'Connor came to Sister Helen on the morning of September 16, 1993, and suggested that Sister Helen phone the C.P.S. to report what she believed to be an instance or instances of child abuse. Specifically, Nurse O'Connor informed Sister Helen that infant Petitioner Nicholas Clark came to school that morning with a black eye, and that this was not the first occasion that she had noticed the Clark children with marks and bruises on their faces. O'Connor, who had been the school nurse since 1981, had been watching the Clark children since one of them came to school with a handprint on his cheek. She had also recorded an instance in March, 1991, when infant Petitioner Michael Clark came to school with a black eye. Based on these particulars, Nurse O'Connor approached Sister Helen and reported her opinion that a child abuse situation existed and that it should be reported.

Sister Helen trusted Nurse O'Connor "explicitly" and believed that she had a reputation for being "a very honest person." Accordingly, Sister Helen relied on Nurse O'Connor's opinion that C.P.S. be called since Nurse O'Connor knew the children longer than Sister Helen, had been at the school longer than Sister Helen, and had observed more than Sister Helen. Both Sister Helen and Nurse O'Connor had been trained in identifying child abuse and in the mandatory reporting procedures once a reasonable suspicion of child abuse existed. Sister Helen's understanding of the procedure was that whenever she suspected child abuse she was mandated by law to report it to C.P.S.

Petitioners, Roseann and Joseph Clark, and their infant children Nicholas and Michael, filed their Original Complaint at Law on December 14, 1992 in the Southern District of New York against the School District and Nurse O'Connor. In the Verified Complaint, Petitioners brought a civil rights action pursuant to 42 U.S.C. § 1983, which also contained pendent state law claims. Jurisdiction over the federal claims was said to exist pursuant to 28 U.S.C. §§ 1331 and 1343(3). The Complaint generally alleged that the School District and Nurse O'Connor's course of action, and the subsequent child abuse investigations of Petitioners, were conducted in bad faith and with wanton disregard of the rights of Petitioners under both the Federal and New York Constitutions, as well as the common law of the State of New York.

On or about April 15, 1993, Respondent School District filed a Third-Party Complaint against Respondents Archdiocese of New York, the St. Augustine School ("St. Augustine School"), Sister Helen, as Principal of the School and employee of the Archdiocese, as well as Third-Party Defendants State of New York, County of Rockland, The Department of Social Services and C.P.S. Subsequently, however, Third-Party Defendant State of New York, County of Rockland and C.P.S. were separated from this action and no longer remain a part of it.

The basis of the federal claims against the School District and O'Connor were that they violated Petitioners' reasonable expectations of privacy as protected by the Fourth, Fifth, Ninth and Fourteenth Amendments to the U.S. Constitution. The claims arose out of the School District and O'Connor's actions in reporting Mr. and Mrs. Clark to C.P.S. These actions, which led to a subsequent investigation of Petitioners by C.P.S., were conducted in concert and under the color of law, and pursuant to official policy. Petitioners nonetheless alleged that the course of action taken by the School District and O'Connor caused

Petitioners severe injuries and damages. Petitioners then alleged that the School District and O'Connor's actions also gave rise to a variety of pendent state law claims.

On August 5, 1994, Respondents St. Augustine School and Sister Helen filed a Motion for Summary Judgment requesting the Third-Party Complaint be dismissed against them. Respondent Nurse O'Connor similarly filed a Motion for Summary Judgment on October 6, 1994, and Respondent School District on October 6, 1994. Petitioners opposed several of the various motions, but specifically failed to oppose St. Augustine School's Summary Judgment motion.

On January 27, 1995, after hearing argument from all sides, the Honorable Charles L. Brieant, District Court Judge of the Southern District of New York, orally granted Respondents' Motions for Summary Judgment and dismissed all federal claims against Respondents with prejudice and dismissed all the pendent state claims against Respondents without prejudice. A written Order was entered in the Office of the Clerk of the Southern District on January 31, 1995.

Petitioners appealed to the United States Court of Appeals for the Second Circuit, which affirmed the Judgment of the Southern District by an Order dated October 13, 1995. The Second Circuit held that Respondents had reasonable cause to believe that infant Petitioners Nicholas and Michael Clark were the victims of child abuse, and that the actions of Nurse O'Connor, Sister Helen and St. Augustine School had not violated the Petitioners' constitutional rights of privacy. It is from the Order of the Second Circuit which Petitioners now move for relief before this Court.

REASONS FOR DENYING THE WRIT

Respondent St. Augustine School submits that this Court should not grant Petitioners' Petition for a Writ of Certiorari for several reasons. Initially, Respondent St. Augustine School respectfully calls to the Court's attention the fact that Petitioners never brought suit against St. Augustine School. The only claims asserted against St. Augustine School were those made by Respondent School District. Petitioners did not oppose the Summary Judgment motion made by St. Augustine School in the District Court. Since Petitioners made reference to St. Augustine School's Summary Judgment motion only in their Notice of Appeal from the Second Circuit Order and Judgment, this Court should recognize that Petitioners never challenged the dismissal of the Third-Party Complaint against St. Augustine School.

Should this Court, however, look beyond this fact, both the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit properly concluded that Respondents had reasonable cause to believe that infant Petitioners Nicholas and Michael Clark were victims of child abuse. Given that school officials and registered nurses are mandated to report incidents of suspected child abuse when such reasonable cause to do so exists, St. Augustine School did not act in bad faith. Accordingly, Respondents' conduct did not violate Petitioners' constitutional rights.

Respondent St. Augustine School further submits that this Court should not exercise its jurisdiction, pursuant to United States Supreme Court Rule 10, 28 U.S.C., to review the Order in question by Writ of Certiorari. First, the Court of Appeals for the Second Circuit's Order was not rendered in conflict with a decision of another United States Court of Appeals on this matter.

Second, the Order does not decide an important federal question in a way which conflicts with the New York State Court of Appeals.

Third, the Second Circuit's Order has not "so far departed from the accepted and usual course of judicial proceedings, or . . . sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision."

Fourth, since this case was heard in federal court, it does not involve a decision rendered by the New York State Court of Appeals which conflicts with the decision of another state court of last resort or of a United States Court of Appeals. Nor does it involve an important question of federal law which was settled by the New York Court of Appeals which has not been, but should be, settled by this Court, or which conflicts with applicable decisions of this Court.

Finally, in their Petition, Petitioners make several unfounded allegations which are not supported by the record below. For instance, Petitioners contend that it was only after St. Augustine School reported them to the authorities that the handprint on infant Petitioner Michael Clark was recalled by Nurse O'Connor. Both the record below and Petitioners' Statement of the Case in the Writ Petition reveal that this allegation is false. Nurse O'Connor recalled receiving the report regarding the handprint on Michael Clark on September 16, 1991, and St. Augustine School reported Petitioners to C.P.S. on September 17, 1991. (*See* Petitioners' Statement of the Case, Petition for Writ of Certiorari, p.5).

Additionally, in their Petition, Petitioners allege, for the first time, that "[w]ithin a week of Respondent O'Connor's complaint, the entire community in which Petitioners lived knew of the allegations made against them and accepted their truth at

face value." Petitioners also contend that Mr. Clark became the subject of an official internal investigation at his place of employment, the Clarkstown Police Department, and that he was repeatedly "cross-examined" about the child abuse allegations by defense attorneys representing persons whom Mr. Clark arrested. The purpose of the these "cross-examinations" by attorneys, Petitioners allege, was to "damage [Mr. Clark's] credibility." (*See* Petitioners' Statement of the Case, Petition for Writ of Certiorari, pp.13-15).

These contentions are mere speculation. The record is completely silent as to the reaction of Petitioners' community and Mr. Clark's place of employment. Petitioners failed to raise these issues below and cannot now rely on these unfounded allegations to petition this Court for a Writ of Certiorari.

Certiorari, which, unlike appeals, is not a matter of right, "should not be granted except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between courts of appeal." *Rice v. Sioux City Memorial Parks Cemetery, Iowa,* 349 U.S. 70 (1955). Consequently, the Second Circuit Court of Appeals properly denied Petitioners' appeal on the ground that Respondents, having had reasonable cause to believe that infant Petitioners Nicholas and Michael Clark were child abuse victims, did not violate Petitioners' constitutional rights.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 18 1996
CLERK

No. 95-1146

In The

Supreme Court of the United States

October Term, 1995

ROSEANN CLARK and JOSEPH CLARK, and INFANT NICHOLAS CLARK and MICHAEL CLARK, by their mother, ROSEANN CLARK,

Petitioners,

vs.

CLARKSTOWN CENTRAL SCHOOL DISTRICT, and HELEN O'CONNOR, individually and in her official capacity as an employee of the CLARKSTOWN CENTRAL SCHOOL DISTRICT, ARCHDIOCESE OF NEW YORK, ST. AUGUSTINE SCHOOL, HELEN BOYCHAK as Principal of St. Augustine School, and as employee of ARCHDIOCESE OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CLARKSTOWN CENTRAL SCHOOL DISTRICT

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69 pp

QUESTION PRESENTED

Whether Respondents violated Petitioners' constitutional rights by reporting or causing a report to be made in accordance with state child protection laws, where reasonable cause existed to suspect that one of the infant Petitioners was a victim of child abuse, where the record before the court below is devoid of any evidence of bad faith, and where Respondent School District's policies, procedures or practices in training its employees as to properly reporting suspected cases of child abuse were in compliance with state law.

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OPINIONS BELOW

On January 31, 1995, the Honorable Charles L. Brieant, the United States District Judge at the United States District Court for the Southern District of New York, entered an Order which granted Respondents' motions for Summary Judgment and dismissed all federal claims against all Respondents with prejudice, and dismissed the pendent state claims against all Respondents without prejudice. Petitioners Mr. and Mrs. Clark and their children, Nicholas and Michael Clark, appealed from said Order.

The United States Court of Appeals for the Second Circuit entered an Order on October 13, 1995, denying Petitioners' appeal because it found that Respondents, having had reasonable cause to report their suspicions of child abuse, did not violate Petitioners' constitutional rights.

The Order and reasoning of the Court of Appeals is set forth in Appendix A of Petitioners' Petition to this Court.

The Order of the District Court is set forth in Appendix B of Petitioners' Petition to this Court.

The transcript of the oral proceedings held before the Honorable Charles L. Brieant, the United States District Judge at the United States District Court for the Southern District of New York, on January 27, 1995, is set forth in Respondents' Appendix A hereto.[1]

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1. References to Respondents' Appendix are designated as "Resp. App." followed by the appropriate page number.

STATEMENT OF THE CASE

Respondent Clarkstown Central School District ("District") submits this Brief in Opposition to the Petition for a Writ of Certiorari (the "Petition") filed by Petitioners. This Brief in Opposition provides Respondent District's reasons for denying the Petition, and addresses perceived misstatements and omissions of fact and law in the Petition.

A. Course of Proceedings and Disposition of the Case Below

Respondent St. Augustine School ("St. Augustine") is a parochial elementary school located in New City, New York, which is under the auspices of the Archdiocese of New York ("Archdiocese"). Respondent Sister Helen Boychak ("Sr. Helen") has been continuously employed as Principal at St. Augustine since July 1, 1989.

Petitioners Roseann Clark and Joseph Clark are the parents of three infant children, Joseph ("Joseph Jr."), Michael, and Nicholas.

Respondent Clarkstown Central School District ("District") is a municipal corporation organized and operated pursuant to New York State Education Law. ("Education Law"). Pursuant to Education Law Section 912, the District provides the services of a registered nurse to St. Augustine.

Respondent Helen O'Connor ("Nurse O'Connor"), a New York State licensed registered nurse since 1976, has been employed by the District as a school nurse for sixteen years. Since 1981, Nurse O'Connor has been continuously assigned by the District to serve as school nurse at St. Augustine.

Pursuant to New York state Social Services Law § 413(1),

school officials, including school nurses, are required to report or cause a report to be made when they have reasonable cause to suspect that a child is an abused or maltreated child. *See* N.Y. Soc. Serv. L. § 413(1) (Resp. App. 40a). The failure of a mandated reporter, such as a school nurse, to report a case of suspected child abuse is a Class A misdemeanor under New York state Social Services Law § 420, and such failure to report may also give rise to civil liability. *See* N.Y. Soc. Serv. L. § 420 (Resp. App. 43a).

Any person, such as a school nurse, who in good faith makes a report or participates in the making of a report of suspected child abuse or maltreatment is entitled to statutory immunity from both civil and criminal liability under New York state law. *See* N.Y. Soc. Serv. L. § 419 (Resp. App. 42a). Absent a showing of willful misconduct or gross negligence, the law recognizes a presumption that the reporter/participant in the reporting acted in good faith.

Under New York state law, a school district, as an employer of persons mandated to report cases of suspected child abuse, is required to provide such employees with training with respect to the identification and reporting of cases of suspected child abuse or maltreatment. *See* N.Y. Soc. Serv. L. § 413(2) (Resp. App. 41a); N.Y. Educ. L. § 3209-a (Resp. App. 43a).

As a New York State licensed provider of child abuse training, the District provided training in the identification and reporting of child abuse to its own employees as well as to others. In its training course, the District utilized the New York State Syllabus training manual on child abuse entitled "Identification and Reporting of Child Abuse and Maltreatment" ("NYS Syllabus") (Record A 143).[2] The NYS Syllabus was prepared and

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2. Reference is made to the Joint Appendix submitted before the United (Cont'd)

published by the New York State Education Department. (Record A159-162, A165). Part 57 of the Regulations of the New York State Commissioner of Education expressly requires providers of child abuse training to use the NYS Syllabus in their training programs. *See* 8 N.Y.C.R.R. § 57.4(a) (Resp. App. 44a).

Each attendee of the District's child abuse training course is given a copy of the District's training material, including the NYS Syllabus. The District's training material contains, among other things, the Board of Education's Policy #5430 entitled "Child Abuse and Maltreatment," and the District's procedures, entitled "Procedures for Reporting Child Abuse, Maltreatment and Neglect," to guide its employees in reporting child abuse, maltreatment and neglect. (Record A234, A235).

Respondent O'Connor attended the District-provided child abuse training course and received a certificate of completion on or about March 21, 1991. (Record A243). As school nurse at St. Augustine, Nurse O'Connor was responsible for maintaining student health records for St. Augustine students. In addition to a student's health history records, Nurse O'Connor also kept a daily log on which she noted the name of each student who came to the nurse's office, the date and time of such visit, the specific complaint of the student, as well as any action taken or treatment given by her.

On March 4, 1991, Joseph Jr. came into Nurse O'Connor's office at St. Augustine with a black eye which she noted on her daily log. (Record A244). Nurse O'Connor also wrote a separate note about this nurse's office visit by Joseph Jr., which she

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(Cont'd)
States Court of Appeals for the Second Circuit, which includes a copy of said NYS Syllabus at A143. Reference to the Joint Appendix is hereinafter designated as "Record" followed by the appropriate page number.

clipped onto Joseph Jr.'s health record. (Record A245). Nurse O'Connor noted in her handwritten note that Joseph Jr. stated that he had sustained the injury playing basketball while visiting his cousin in Staten Island.

On June 21, 1989, Nurse O'Connor had also made a handwritten note of a report to her by Joseph Jr.'s teacher and the then principal at St. Augustine of a handprint visible on Joseph Jr.'s face. (Record A247). Nurse O'Connor herself had not personally observed the handprint on Joseph Jr.'s cheek, but had been told about it separately by the teacher, Mrs. Barile, and the principal at that time, Mr. Borchetta. Principal Borchetta advised Nurse O'Connor to make a "mental note" of the handprint incident, and to observe the situation in the future. Mrs. Barile noticed this handprint on Joseph Jr.'s face the day after she had had a conversation with Joseph Jr.'s father concerning a problem Mrs. Barile had been having with Joseph Jr. Mrs. Barile reported this information directly to Nurse O'Connor.

On Monday morning, September 16, 1991, Nurse O'Connor observed Nicholas in school with a black eye, more precisely described by her as a red area on the cornea, with the surrounding area being black and blue and swollen. When Nurse O'Connor asked Nicholas what had happened to his eye, Nicholas indicated that he had suffered a black eye while he was playing with his cousin from Staten Island. Later that same morning, Nurse O'Connor reported Nicholas' black eye to Sr. Helen, the school principal. Nurse O'Connor related to Sr. Helen the two prior incidents concerning physical injuries to Nicholas' older brother Joseph Jr., and stated that she had suspicions concerning Nicholas' injury based on the two prior incidents.

Nurse O'Connor also told Sr. Helen on September 16, 1991, that she (O'Connor) was a mandated reporter of child abuse, that because of the two previous incidents involving a sibling, she

suspected child abuse in this instance, and that she was mandated to report her suspicions to the school principal. Early in the morning of September 17, Sr. Helen then telephoned Child Protective Services ("CPS"), related the facts to the individual who answered the phone, and asked if the black eye were a reportable incident. The CPS representative advised Sr. Helen that this was a reportable incident, and provided Sr. Helen with the telephone number of the Rockland County Child Protective Services. Shortly thereafter, a CPS investigator, Ms. Brovarski, came to St. Augustine and separately interviewed Nicholas and Michael in Sr. Helen's office.

Neither Sr. Helen nor Nurse O'Connor was in the office while Ms. Brovarski conducted her interviews of the two Clark children. During her interview with Nicholas, Ms. Brovarski took two Polaroid photographs of Nicholas' eye. She did not photograph any other part of his body, nor ask him to remove any clothing, nor examine any part of his body. In late afternoon of the same day that she interviewed Nicholas and Michael, Ms. Brovarski interviewed petitioners Roseann Clark and Joseph Clark at the Clarks' home. Following Ms. Brovarski's investigation, CPS determined that there was inadequate evidence to support a finding of child abuse, and the Clarks were notified by the New York State Department of Social Services ("DSS") that all identifying information would be expunged from the New York State Child Abuse And Maltreatment Register as well as from CPS' records.

Petitioners, Roseann and Joseph Clark and their infant children Nicholas and Michael, filed a Verified Complaint on or about December 14, 1992 in the United States District Court for the Southern District of New York against Respondents District and Nurse O'Connor, alleging a civil rights claim pursuant to 42 U.S.C. § 1983, as well as pendent state law claims. Jurisdiction over the federal claims was said to exist pursuant to 28 U.S.C.

§§ 1331 and 1343(3). The Complaint alleged that Respondent O'Connor violated Petitioners' constitutional rights under the Federal and New York Constitutions, as well as under the common law of the State of New York, because she initiated a report of child abuse without reasonable cause to suspect that child abuse had occurred. The Complaint alleged that Respondent District is liable for Nurse O'Connor's alleged misconduct because her actions were taken pursuant to official District policy, and/or because the District allegedly failed to adequately train or supervise Nurse O'Connor with respect to the reasonable cause standard for reporting suspected cases of child abuse.

On or about April 15, 1993, Respondent School District filed a Third Party Complaint against Respondents Archdiocese of New York, the St. Augustine School, Sister Helen, as Principal of the School and employee of the Archdiocese, as well as Third-Party Defendants State of New York, County of Rockland, Department of Social Services and Child Protective Services. Subsequently, however, Third-Party Defendants State of New York, County of Rockland and CPS were separated from this action and no longer remain a part of it.

Respondents St. Augustine School and Sister Helen filed a Motion for Summary Judgment requesting the Third-Party Complaint be dismissed against them on or about August 5, 1994. Respondents Nurse O'Connor and the District similarly filed Motions for Summary Judgment on or about October 4, 1994 and October 6, 1994, respectively. Petitioners filed their opposition to the various motions.

On January 27, 1995, after hearing argument from all sides, the Honorable Charles L. Brieant, District Court Judge of the United States District Court for the Southern District of New York, orally granted Respondents' Motions for Summary

Judgment and dismissed all the federal claims against Respondents with prejudice, and dismissed the pendent state claims without prejudice. A written Order was entered in the Office of the Clerk of the Southern District on January 31, 1995.

Petitioners appealed to the United States Court of Appeals for the Second Circuit, which affirmed the Judgment of the Southern District by an Order dated October 13, 1995. The Second Circuit held that Respondents had reasonable cause to believe that infant Petitioners Nicholas and Michael Clark were the victims of child abuse, and that the actions of Nurse O'Connor, the District, Sister Helen and St. Augustine School had not violated the Petitioners' constitutional rights of privacy. It is from the Order of the Second Circuit which Petitioners now move for relief before this Court.

B. Petitioners' Misstatements and/or Omissions of Fact and Law

Pursuant to Supreme Court Rule 15.2, Respondent District provides the following corrections of perceived misstatements of fact and law and omissions of significant facts in the Petition.

1. Petitioners misstate the facts concerning Nurse O'Connor's observation of the black eye sustained by Nicholas' older brother (Petition, 5). Petitioner mistakenly identifies the brother as Michael Clark, when, in fact, the record clearly states that it was Joseph Jr. who had sustained the black eye. (Record A244, A245). Petitioner also misstates the date of the occurrence as April 4, 1991; Nurse O'Connor observed said injury to Joseph Jr. on March 4, 1991. (Record A244, A245).

2. Petitioners misstate the facts concerning the report of a handprint on the face of Nicholas' older brother (Petition, 5). Petitioner mistakenly identifies the brother as Michael Clark,

when, in fact, the record clearly shows that it was Joseph Jr. who was reported to have had the handprint on his cheek. (Record A247). Petitioner also misstates the date of the report as June 21, 1991; Nurse O'Connor received said report on June 21, 1989. (Record A247).

3. Petitioner erroneously alleges that Nurse O'Connor's recollection of Joseph Jr.'s black eye and handprint did not occur until after she had made her report of suspected child abuse, and that such events were "manufactured" by Respondent O'Connor or the District in order to provide justification for Nurse O'Connor's suspicions (Petition, 5, 10-12). In fact, Nurse O'Connor recalled both of these incidents prior to reporting her suspicions of child abuse to Sr. Helen. In making her report, Nurse O'Connor related to Sr. Helen the two prior incidents concerning physical injuries to Nicholas' older brother Joseph Jr., and stated that she had suspicions concerning Nicholas' injury based on the two prior incidents.

4. Petitioners misstate that "Respondent O'Connor concluded that Nicholas had been the victim of child abuse." (Petition, 5). In fact, Nurse O'Connor merely reported to Sr. Helen that, based on her observations of Nicholas' black eye and her recollections of prior similar injuries to Nicholas' brother Joseph Jr., she suspected child abuse. Pursuant to New York state Social Services Law § 413, and consistent with her training by Respondent District, Nurse O'Connor was mandated by law to report such suspicions of child abuse. However, she had no duty to investigate or conclusively prove that child abuse in fact had occurred.

5. Petitioners misstate that Respondent O'Connor "forsook her duty, if she was sincere in her suspicions [of child abuse], when she permitted the children to return home." (Petition, 13). Respondent O'Connor was under no statutory

duty, nor did she have the authority, to take the Clark children into protective custody.

6. Petitioners misstate that "Respondents made public the fact that the allegations [of child abuse] were made." (Petition, 13). At no time did Respondents reveal the suspicions of child abuse to any individual not authorized to receive such information, and the record is barren of any proof that Respondents did so.

7. Petitioners misstate that "the Courts below appeared to have accepted the proposition that Petitioners have no liberty interest to be free from unreasonable, arbitrary or unwarranted child abuse investigations." (Petition, 15). In its decision, the United States Court of Appeals for the Second Circuit expressly stated:

> We may assume that [Petitioners] are correct that they have a constitutionally protected liberty interest to be free from child abuse investigations absent "reasonable cause" to believe that a child is being abused. We nevertheless believe that O'Connor had reasonable cause to report her suspicions of child abuse to her immediate supervisor, [Sr. Helen], who then had similar cause to pass on the report to third-party defendant Child Protective Services.

(Pet. App. A, 3a).

8. Petitioners misstate that the record before the Court below contained "no definitive showing that the action taken by Respondent Clarkstown Central School District had the prerequisite predicate of 'reasonable cause.'" (Petition, 17-18). First of all, the premise of petitioner's statement is faulty,

inasmuch as Respondent District, as an employer of persons mandated to report suspected incidents of child abuse, is not a "person" or "official" required by state law to report suspected incidents of child abuse where reasonable cause exists to do so. Rather, Respondent District is required under state law only to provide its employees with "written information explaining the reporting requirements set out in" Sections 413, 415-420 of the New York state Social Services Law. *See* N.Y. Soc. Serv. L. § 413(2). Petitioners do not dispute that the District fulfilled said requirement. In any event, the record before the Courts below contains considerable evidence to show that reasonable cause did exist to suspect child abuse.

9. Petitioners misstate that Respondent O'Connor's report of suspected child abuse was "arbitrary, unreasonable and unwarranted," and that "it cannot be found as a matter of law that Respondent O'Connor had the 'reasonable cause' required under New York SSL § 413 to suspect that Petitioners' children were abused within the meaning of the statute." (Petition, 18-19). As properly determined by the courts below, the record contains considerable evidence to show that, as a matter of law, reasonable cause did exist to suspect child abuse.

10. Petitioners misstate that "in this instance, due process can only be satisfied, if there is an objectively reasonable basis to believe that child abuse occurred and 'reasonable cause' exists to believe that child abuse occurred." (Petition, 18-19). Pursuant to New York state Social Services Law § 413, a mandated reporter need only have "reasonable cause to suspect" that a child is abused or maltreated in order to make a report. Pursuant to the state-published and mandated NYS Syllabus, mere suspicion of abuse, rather than conclusive belief, is sufficient to satisfy reasonable cause if:

> considering what physical evidence s/he observes or is told about, and from his/her

> own training and experience, it is **POSSIBLE** that the injury or condition was caused by neglect or by nonaccidental means. The reporter need not be absolutely certain that the injury or condition was caused by neglect of by nonaccidental means; the reporter should only *BEABLE TO ENTERTAIN THE POSSIBILITY THAT IT COULD HAVE BEEN NEGLECT OR NONACCIDENTAL* in order to possess the necessary "reasonable cause."

(Emphasis in original) (Record A182). Thus, due process is satisfied if the person making the report has an objectively reasonable basis to suspect that child abuse could possibly have occurred.

11. Petitioners misstate that "it is possible that a genuine issue of material fact existed as to whether or not it was clear that the actions [Respondent O'Connor] took violated one of Respondents' established constitutional rights." (Petition, 19). The record before the Courts below contains no genuine issue as to the facts which formed the basis of Nurse O'Connor's reasonable cause suspicion that child abuse may have occurred.

12. Petitioners misstate that "there were several substantial deficiencies in the policy, procedures and training program on child abuse identification and reporting employed by Respondent School District." (Petition, 20). The evidence in the record before the courts below indisputably established that the District's policy, procedures and training program were adequate and appropriate as a matter of law because said policy and procedure were established pursuant to state law, and said training program was licensed and designed by the New York State Education Department. The District is designated by New York State as a licensed provider of child abuse training; the New

York State Education Department prepared and published the training manual used by the District for the course; and Part 57 of the Regulations of the New York State Commissioner of Education expressly requires providers of child abuse training to use the NYS Syllabus in their training programs. The Petition omits these facts. Thus, the District's training program to instruct compliance with § 413's reporting requirements is adequate as a matter of law.

13. Petitioners misstate that "there was a complete omission of the requirement that the district employee making the report must have an objectively reasonable basis to make such a report." (Petition, 20). There is no requirement under New York state Social Services Law that mandated reporters have "an objectively reasonable basis" to make reports of suspected child abuse. Rather, state law requires that reporters have "reasonable cause to suspect" that a child is abused or maltreated. *See* N.Y. Soc. Serv. L. § 413(1). The District's training indisputably included explicit instruction as to the reasonable cause standard. (Record A182). Moreover, the existence of "reasonable cause to suspect abuse" constitutes "an objectively reasonable basis" for making reports of such abuse as a matter of law.

14. Petitioners misstate that "there was a complete omission of any reference to the individual's clearly established right to be free from invasions of privacy due to arbitrary, unreasonable and unwarranted child abuse investigations." (Petition, 20). There is no requirement under New York state Social Services Law that employers instruct mandated reporters to consider an individual's right to be free from invasions of privacy. Rather, the District's training as to the "reasonable cause" standard, and the requirement that mandated reporters have "reasonable cause to suspect" child abuse, sufficiently protects an individual's right to be free from arbitrary, unreasonable or unwarranted child abuse reports as a matter of law.

15. Petitioners misstate that "there was a complete omission of any definition of the concept of '[reasonable cause,'" and that "the term 'reasonable cause' is mentioned in only two places within the policy, procedures and training program on child abuse identification and reporting." (Petition, 20). In fact, the District training manual included a separate section entitled "Reasonable Cause To Suspect," contained in the state-mandated NYS Syllabus, which set forth in detail the definition of "reasonable cause" and "suspicion." (Record A182). That section states:

> A. Reasonable Cause
>
> A person can have "reasonable cause" to suspect that a child is abused or maltreated if, considering what physical evidence s/he observes or is told about, and from his/her own training and experience, it is **POSSIBLE** that the injury or condition was caused by neglect or by nonaccidental means. The reporter need not be absolutely certain that the injury or condition was caused by neglect of by nonaccidental means; the reporter should only ***BEABLETO ENTERTAIN THE POSSIBILITY THAT IT COULD HAVE BEEN NEGLECT OR NONACCIDENTAL*** in order to possess the necessary "reasonable cause."

(Emphasis in original) (Record A182). Thus, the District's training program included explicit instruction as to the "reasonable cause" standard for suspecting child abuse.

16. Petitioners misstate that "there is ample evidence to demonstrate that the report of suspected child abuse made by Respondent O'Connor was either willful misconduct and/or

gross negligence." (Petition, 22). Based on New York state's standard for reasonable cause, the record indicates that Nurse O'Connor had reasonable cause to suspect child abuse. Moreover, as confirmed by the courts below, the record is devoid of any evidence of bad faith, misconduct or negligence on the part of any of the Respondents.

17. Petitioners inappropriately alleged in their Petition, for the first time, that Mr. Clark became the subject of an official internal investigation at his place of employment, the Clarkstown Police Department, and that he was repeatedly "cross-examined" about the child abuse allegations by defense attorneys representing persons whom Mr. Clark had arrested. (Petition, 13-14). These contentions were not raised before the courts below and are mere speculation. The record contains no evidence that Mr. Clark was subjected to such treatment. Accordingly, the District submits that Petitioners should not be permitted to rely on such unfounded allegations in support of their Petition.

REASONS FOR DENYING THE WRIT

I.

THE PETITION PRESENTS NO SPECIAL OR IMPORTANT GROUNDS FOR CERTIORARI.

Respondent District submits that this Court should not exercise its jurisdiction, pursuant to United States Supreme Court Rule 10, 28 U.S.C., to review the Order in question by Writ of Certiorari, because none of the grounds delineated in said Rule is present, or even asserted by Petitioners, in the instant case. Certiorari decisions are not a matter of right, but rather, are wholly discretionary. *Durham v. United States*, 401 U.S. 481 (1971). Moreover, certiorari "should not be granted except in cases involving principles the settlement of which is of

importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between courts of appeal." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955). The District submits that no compelling ground exists in the instant case to grant certiorari.

Petitioners do not allege that the Order of the Court of Appeals for the Second Circuit was rendered in conflict with the decision of another United States Court of Appeals on this matter, that the Order decides an important federal question in a way which conflicts with the decisions of the New York State Court of Appeals, or that the Second Circuit's decision has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *See* Supreme Court Rule 10.1(a).

Moreover, inasmuch as this case does not involve a decision rendered by the New York State Court of Appeals, none of the grounds in Supreme Court Rule 10.1(b) or (c) applicable to the decisions of said Court is applicable to the instant case.

Finally, the District submits that the Order of the United States Court of Appeals for the Second Circuit did not decide an important question of federal law which has not been, but should be, settled by this Court, nor did it decide a federal question in a way that conflicts with applicable decisions of this Court. *See* Supreme Court Rule 10.1(c).

The only conceivable federal question raised by Petitioners is whether or not they have a constitutionally protected liberty interest to be free from child abuse investigations absent "reasonable cause" to suspect that a child has been abused. However, Respondent District submits that this Court need not reach said question, inasmuch as the Second Circuit has decided

that, even if petitioners had such a "constitutionally protected liberty interest," reasonable cause existed in this matter sufficient to satisfy that interest:

> We may assume that [Petitioners] are correct that they have a constitutionally protected liberty interest to be free from child abuse investigations absent "reasonable cause" to believe that a child is being abused. We nevertheless believe that O'Connor had reasonable cause to report her suspicions of child abuse to her immediate supervisor, [Sr. Helen], who then had similar cause to pass on the report to third-party defendant Child Protective Services.

(Pet. App. A, 3a).

Therefore, Petitioners have failed to set forth any special or important reason for this Court to exercise its jurisdiction. The Question Presented by Petitioners presents no unsettled federal issue, but merely seeks to have this Court review the factual findings of the courts below, which established that Respondent O'Connor had reasonable cause to suspect child abuse and that Respondent District adequately trained Nurse O'Connor in the reporting of child abuse. The District submits that that is not sufficient grounds for granting Certiorari.

II.

THE QUESTION PRESENTED BY PETITIONERS WAS PROPERLY DETERMINED BY THE COURTS BELOW IN FAVOR OF RESPONDENTS.

Should the Court nevertheless review the findings of the courts below, it will find that both the District Court for the

Southern District of New York and the Court of Appeals for the Second Circuit properly determined that Respondents had reasonable cause to suspect child abuse, that Respondent O'Connor was adequately trained by Respondent District, and that there was no evidence of bad faith on the part of Respondents. Accordingly, the courts below properly concluded that Respondents' actions did not violate Petitioners' constitutional rights.

The record before the courts below established that the District's training program, based on a New York State-mandated course, was not merely adequate, *per se*, as a matter of law, but it also comprises the state mandated legal standard for training and instruction in the identification and reporting of child abuse. (Record A159-162, A165). The District's training program appropriately instructed District employees as to the "reasonable cause" standard for reporting suspected cases of child abuse. (Record A182). Nurse O'Connor participated in and completed the District's training program. (Record A243). Thus, there can be no dispute that the District fulfilled its obligation to train Nurse O'Connor to identify and report suspected cases of child abuse.

Based on the standard for reasonable cause set forth in New York state Social Services Law § 413, Nurse O'Connor clearly had reasonable cause to suspect child abuse. In establishing reasonable cause to suspect child abuse, it was enough for Nurse O'Connor to distrust or doubt the explanation she was given for the injury to plaintiff Nicholas Clark's eye. *See* NYS Syllabus § 2(II)(B) (Record A182). The record indicates that, on or about September 16, 1991, Nurse O'Connor saw plaintiffs' son Nicholas and observed that he had a black eye. Nurse O'Connor also recalled a previous incident in March, 1991, when Nicholas' brother, Joseph Jr., had come to her with a similar bruise around his eye and had given her a strikingly similar explanation of how

he had sustained the injury. (Record A244). In addition, Nurse O'Connor was aware of yet another earlier instance of suspicious injury involving a handprint on Joseph Jr.'s cheek in June, 1989. (Record A247). As noted in the NYS Syllabus, it was proper for Nurse O'Connor to consider each of these incidents in forming her reasonable cause determination. In light of these incidents, Nurse O'Connor had reason to doubt Nicholas Clark's explanation that his injury was caused during a football game. Based on the nature of Nicholas' injury, and on her experience as a nurse, Nurse O'Connor did not believe that Nicholas' injury was consistent with a football injury. Thus, after examining Nicholas' black eye, Nurse O'Connor reported the incident and her suspicions of child abuse to Sr. Helen, based on the suspicious nature of these incidents of injury. Under these circumstances, there can be no question of material fact that Nurse O'Connor had reasonable cause to report suspected child abuse.

Petitioners' argument that the District's policy, procedure and training program are deficient because they failed to protect petitioners' right to be free from invasions of privacy is unavailing. There is no requirement that reporters of suspected child abuse weigh the constitutional interests of a family to privacy before reporting suspected cases of child abuse, or that the District train them to do so. Rather, New York's statutory scheme is expressly designed to protect the welfare of children over the privacy interests of their parents or families by encouraging more complete reporting of suspected child abuse. Accordingly, the state's "reasonable cause" standard requires mandated reporters to report suspected abuse where the mere possibility arises that an observed injury or condition was caused by abuse, neglect or nonaccidental means. There is no requirement that reporters prove or verify the suspected abuse prior to making a report.

Moreover, Petitioners' due process claims were properly dismissed because Petitioners were not deprived of any property or liberty interest without due process. Petitioners failed to establish how the District's actions violated their claimed liberty interest to privacy. Even if petitioners did establish that they had a protected liberty interest to privacy of which they were deprived, the record is clear that they were not deprived of such interest without due process of law. Rather, due process was satisfied by Respondents' finding of "reasonable cause" to suspect child abuse, as well as by New York's post-deprivation remedy of expunging DSS and CPS records concerning Petitioners. Therefore, Petitioners have not been deprived of any liberty interest without due process of law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: Garden City, New York
March 18, 1996

Respectfully submitted,

FLORENCE T. FRAZER
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APPENDIX A — TRANSCRIPT OF PROCEEDINGS DATED JANUARY 27, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 Civ. 9015

ROSEANN CLARK and JOSEPH CLARK, and INFANT NICHOLAS CLARK and MICHAEL CLARK, by their mother, ROSEANN CLARK,

Plaintiffs,

-against-

CLARKSTOWN CENTRAL SCHOOL DISTRICT, and HELEN O'CONNOR, individually and in her official capacity as an employee of the CLARKSTOWN CENTRAL SCHOOL DISTRICT,

Defendants.

CLARKSTOWN CENTRAL SCHOOL DISTRICT,

Third-Party Plaintiff,

-against-

ARCHDIOCESE OF NEW YORK ST. AUGUSTINE SCHOOL, HELEN BOYCHAK, as Principal of St. Augustine School, and as employee of ARCHDIOCESE OF NEW YORK, and STATE OF NEW YORK, COUNTY OF ROCKLAND, DEPARTMENT OF SOCIAL SERVICES, CHILD PROTECTIVE SERVICES,

Appendix A

United States Courthouse
White Plains, New York
January 27, 1995
10:41 o'clock a.m.

Before: *HON. CHARLES L. BRIEANT,*
District Court Judge

Court Reporter: ANGELA A. O'DONNELL, RPR

Proceedings recorded by mechanical stenography, transcript produced by C.A.T.

[2] APPEARANCES:

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AMHUTY, DEMERS & MC MANUS, ESQS.
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BY: KEVIN G. MC MORROW, Esq., of Counsel

Appendix A

STERN, KING, HOEY, TOKER & LEVINE
Attorneys for Defendants Archdioces of New York,
St. Augustine School and Helen Boychak
100 William Street
New York, New York 10038-4568
BY: EDWARD M. EUSTACE, Esq., of Counsel

[3] PROCEEDINGS

THE COURT: We have some motions and the Court is prepared to hear the motions at this time.

Which of you wants to go first?

MR. EUSTACE: I'll begin, your Honor.

Good morning, your Honor. My name is Edward Eustace, and I'm representing the third-party defendants in this case, St. Augustine School, Sister Helen Boychak, and it's stated in the complaint her name is actually Doychak, D.

THE COURT: How is it, V?

MR. EUSTACE: D as in David. And the Archdiocese of New York.

As the Court is no doubt aware, this case involves some foundation facts whereby Sister Helen made a telephone call to the Child Protection Service based upon information received by her from the co-defendant, Nurse O'Connor, regarding evidence of child abuse.

COURT: You understand that if the federal claims are

dismissed, this Court would have to dismiss the state claims without prejudice?

MR. EUSTACE: Understood, your Honor.

THE COURT: You're just going to be sued across the street.

MR. EUSTACE: I think on the merits the state [4] claims would have to be dismissed as well due to the statutory immunity we would have from these claims.

THE COURT: I'm not sure this Court ought to adjudicate pendent state claims when you're not on the eve of trial.

MR. EUSTACE: That particular issue doesn't necessarily impact upon my client. I'm a third-party defendant and my position is irrespective of what happens in the prior motions, the motions between the primary defendants and the plaintiff. There's absolutely not one shred of evidence that Sister Helen acted in anything but good faith or had anything but an immunity for what she did.

The facts are fairly clear and undisputed that she called based upon representations made to her by Nurse O'Connor, who she knew to have a reputation for honesty. She worked with her for many years, a registered nurse for fifteen years at that point, and she had no reason to doubt the veracity of her report. Once she heard that report, she was mandated by law to call the CPS. She called the CPS and then interestingly, the CPS further authorized her to make a second telephone call. They gave her a phone number to call. That's further evidence of her acting in nothing but good faith.

And again, irrespective of what happens with respect to the primary motions involving the plaintiff and, [5] the prime defendants, the third-party action must be dismissed as there's no evidence, not even an argument advanced, that Sister Helen acted in bad faith.

THE COURT: Third-party complaint is merely for contribution or indemnification.

MR. EUSTACE: That's correct, your Honor. The basis of that would have to be triggered by some evidence — some evidence of —

THE COURT: Plaintiffs didn't sue your clients?

MR. EUSTACE: Absolutely correct, sir.

THE COURT: All right, is there anything else?

MR. EUSTACE: That's all. I'll rest on the papers otherwise.

THE COURT: Who wishes to be heard on behalf of the main defendants?

MR. MC MORROW: Good morning, your Honor. I'm Kevin McMorrow, and I represent Helen O'Connor, who was sued officially in that capacity as a nurse and employee of the Clarkstown Central School District. I represent her within her individual capacity as well.

Your Honor, Nurse O'Connor, as an employee of Clarkstown, she's a registered nurse, she was assigned to work in the Roman Catholic school of St. Augustine where she worked

for several years. As a registered nurse, she had been told, as had other nurses and doctors and physicians a [6] year earlier, that New York State was requiring that she attend a particular class to be given by the State following the implementation of a statute which would require her, being in a position to see young children, that she should report any suspected instances of possible maltreatment of a child.

She took that course and she was told, your Honor, in that course she was given a list which was provided to her prepared by the State of New York, which indicated if she had a reasonable cause to suspect that an injury occurred to a child she should report that to the supervisor.

In this case, your Honor, her supervisor would be Sister Heller or rather Sister Helen who is also the principal of the Roman Catholic school.

Now, the whole case comes about particularly one day she happened to see Nicholas Clark come into school with a black eye. She inquired why he had a black eye. He told her a story he received it from playing a sporting event with a cousin from Staten Island. It was a familiar story to her. Apparently, she had heard it six months earlier as it had been told to her by a youngster named Joseph Clark, a sibling of Nicholas.

Apparently, Joseph Clark had been at the school in the principals office, following his involvement in a [7] mooning incident. His parents were told to come into the school, see the principal. He apparently had a black eye and Helen O'Connor asked him why he had a black eye and he gave almost an identical explanation. He had been involved in a sporting event with the same cousin in New Jersey.

Appendix A

My understanding from the medical records is that the — we're talk about a little more than a black eye. There was some apparent seriousness or potential seriousness to the eye besides just the normal black eye. Nurse Helen O'Connor had also recalled that I guess it was about two years earlier she had been told by another teacher at the school and also a principal at the school, who is not Sister Helen but a former principal, that they had observed apparently the same youngster, Joseph Clark, arrive to school one morning with what appeared to be a hand print on his face.

Helen O'Connor never saw that hand print but she was told about it by the teacher whose name is Mrs. Barile and also by the principal. She did make a note of it. At that particular time, she was not aware of this statute that she was required to tell anyone any suspicions about an injury, and I don't believe she was required at that time.

Based upon this collection of instances, your Honor, what Helen O'Connor did was take this information and spoke to the principal of the school, Sister Helen.

[8] Helen O'Connor felt she was required under the regulations to do so. She felt she did have the reasonable cause to suspect, as she was told in the guidelines given out by the State, she should have this reasonable cause, it is possible that the injury could have been caused by some instance other than what was explained, and having heard these two almost identical explanations about these cousins from Staten Island causing these injuries from the past two other siblings plus the other instance, she certainly thought she would entertain the possibility there was negligence.

Apparently, that was the standard that was provided to her by the state. The standard is one of reasonable cause, not one of probable cause or reasonable suspicion, as the criminal law. I believe the threshold is very, very light on that end, at least as it is explained to health care providers and she did have such suspicion and it was reasonable. She did tell Sister Helen and Sister Helen did pick up the phone and call the CPS. Sister Helen asked the CPS: Is this the type of thing we should report to you? And Sister Helen supposedly was told, that's the testimony that's come out before the court, the documents that are provided, Sister Helen was told: Yes, you do have to report this and leave it to us.

[9] THE COURT: What do you understand to be — I know you're not the author of the complaint — what do you understand to be the federal claim pleaded here?

MR. MC MORROW: Your Honor, I do raise in my papers an argument about the federal claim. It's alleged that my client took these children out of the class, physically examined them, photographed them.

THE COURT: In violation of what constitutional right?

MR. MC MORROW: I interpret it as a 4th and 12th Amendment.

THE COURT: As what?

MR. MC MORROW: Really, that's my interpretation of my reading of the complaint.

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THE COURT: Eventually, I think we'll hear from the author. Go ahead, sir.

MR. MC MORROW: Basically, I think when we come down to the basic issue of the case, whether or not I think Helen O'Connor acted properly under the guidelines of the law when she took this collection of information that had been made known to her of these three prior instances, based upon that, had a suspicion perhaps what's being told to her by this child is not true and brought this information to the supervisor of the school. That's what I think Sister Helen did right, turning around and saying we're not trained [10] in this regard, we don't have investigative capabilities. She called the CPS, which is what she's required to do. That's the purpose of the law. The purpose of the Social Service law, as I understand it, is trying to recognize the children do not have any type of champion out there on a daily basis. They are being abused by parents or someone at the home.

The state has chosen those individuals who most likely come in contact with a child; that would be someone at the school or health care facility. If they suspect something, they're supposed to call the investigators, not to come to any conclusion, investigate themselves, interview, take photographs. That's what the experts at CPS are suppose to do and that's what Helen O'Connor did and that's what Sister Helen did.

I think the real issue is whether or not knowing of these three instances and coming across this last one with Nicholas, whether or not that rose to the level of the threshold of what's called reasonable cause for her to suspect what she was being told was not proper and that she should tell Sister Helen and perhaps tell CPS. That's the real issue in this case, I think.

I do know that CPS did send an investigator. The plaintiffs did not sue CPS. As a matter of fact, they were sued, so is the state and county in the third-party action. [11] That was dismissed by Judge Goettel some time ago.

THE COURT: I'm sorry?

MR. MC MORROW: I was pointing out that the state and County of Rockland and CPS were made part of this case.

THE COURT: I don't see any significance in that one way or the other.

MR. MC MORROW: I bring it out, your Honor, because CPS formed their investigation following the information provided to them by Sister Helen, which is the way the law should be.

Under the circumstances, the Social Service law, the mandated reporter is a registered nurse and that is Helen O'Connor. She is a mandated reporter, so is the principal of the school. The Social Service law does indicate they will be given qualified immunity. If they act according to the statute, they're also told under the statute, good faith is presumed.

I think under these circumstances, I think you could say, as a matter of law, that knowledge of the information possessed by Helen O'Connor is certainly sufficient for her to go and tell Sister Helen who is the principal of the school.

As such, I don't see that as any possible violation of civil rights of the plaintiffs. They were photographed, but that was done by CPS, not by Helen O'Connor. That was [12] brought out

in the complaint, as if Helen O'Connor did that. That, I think, is certainly not true.

As far as the pendent claims, there are state claims against Helen O'Connor, one of which is to be libel and slander. I essentially — according to the testimony of one of the plaintiffs, Roseann Clark, the mother, she claimed that she was told by two teachers at the school that these two teachers have been told by Helen O'Connor that, in fact, Helen O'Connor said to them there was an inquiry underway by CPS for child abuse.

Roseann Clark states she never heard that directly from Helen O'Connor but it was told to her by these two individuals. We did depose those individuals. Helen O'Connor denies she ever spoke to anyone about that. Those two teachers identified by Roseann Clark came in, were deposed, both deny hearing anything from Helen O'Connor about a CPS investigation. They have denied telling Roseann Clark anything of that or ever suggesting to Helen or suggesting to Roseann Clark that they had heard such a thing from Helen O'Connor.

One of the witnesses, Mrs. LaRosa went so far as to say she did hear there was a CPS inquiry and she heard that from Roseann Clark herself the very meeting, conversation, that Roseann Clark referred to. Their testimony is not evidence. We have submitted the affidavit or rather the [13] transcripts of the deposition of Helen O'Connor as well as the witnesses. I think there's more than sufficient evidence, your Honor, for a motion for summary judgment to be granted with regard to these state claims for libel and slander.

THE COURT: Well, I think it is quite clear this case is not a situation where the Court should address the pendent claims. Our

circuit has indicated to us we're only here because of a civil rights case. They should be dismissed without prejudice. I shouldn't have to reach them. All right, thank you, sir.

MR. MC MORROW: You're welcome, your Honor.

MS. FRAZER, Good morning, your Honor, my name is Florence Frazer from Ehrlich, Frazer & Feldman and we're counsel for Clarkstown Central School District.

Clarkstown is a defendant in this case because it is the public school district in which St. Augustine School is located and under New York State Education Law. The school district has an obligation to provide a health services provider, and we do employ defendant Helen O'Connor as one of our employees.

THE COURT: Sister Doychak was not her supervisor?

MS. FRAZER: Indeed she was. Yes, she is, she is.

THE COURT: How can you be a supervisor when you're not the employer?

[14] MS. FRAZER: She's the building principal, and under the guidelines of both the school district and St. Augustine, the building principal, the building administrator has the authority to act in these cases. The nurse is required to report to the building administrator. Her supervisor in Clarkstown Central School District is Mary Ann Proir, the director of health services for the entire school district. She's located elsewhere. Clearly, her immediate supervisor is Sister Helen Doychak.

THE COURT: You say that's derived from an agreement with the school district?

MS. FRAZER: It's derived actually from practicality and her immediate supervisor, for purposes of reporting, and I believe it's in the statute as well, your Honor, that the building administrator is the one to whom you report rather than to a third party who's not involved in he school at all, not familiar with it.

Mrs. Proir is with the central administration of the school district, oversees many, many employees, but would have no contact generally with the pupils and staff at St. Augustine, except on an occasional basis, she deals with Sister Helen as the immediate supervisor and her subordinate because, indeed, Ms. O'Connor is her subordinate employee.

But for these purposes, the appropriate person for Nurse O'Connor to report to was the building administrator, [15] if that answers your Honor's question. In this particular case, the school district is responsible under Educational Law Section 3209-A to provide training with regard to child abuse and maltreatment.

Under the regulations of the New York State Commissioner of Education, Part 57, the school district is required not only to provide such training but to use as its training manual the document known as the New York State Syllabus on Child Abuse and Maltreatment.

And indeed, the record is clear that the Clarkstown Central School District did provide such training. That it did provide training using the New York State Syllabus, which I would point out to the Court is a document prepared by New York State, in the record as Exhibit A to Clarkstown's 3-G statement.

And close examination of that document reveals it was

compiled by the New York State Education Department in conjunction with numerous officials who are involved in child welfare, including numerous officials from the Department of Social Services, various medical personnel, et cetera.

Clarkstown was a licensed provider of such training, licensed by the State of New York to provide training not only for its own employees but for all mandated reporters in the area who desired or needed to take such [16] course.

The record is clear also that New York State Syllabus is adequate training as a matter of law, it's provided by the state, it's required by the state, it provides a definition of reasonable cause to suspect. It guides the employees or those taking the course on what it is they're supposed to use and the guideline and that information is contained, contrary to plaintiff's allegation in their responsive papers here.

There are several references to reasonable cause as well as reasonable cause to suspect in Exhibit A, which is the New York State Syllabus.

My point here, your Honor, is that Clarkstown Central School District has clearly, clearly abided by all its requirements by: Number one, providing training; by, number two, using the New York State Syllabus as its training manual; and number 3, providing training specifically to this defendant, Nurse O'Connor.

In fact, there's a certificate of completion, and the record is clear from depositions, that Helen O'Connor did take this course in March of 1991, which is prior to the incident in question here. The incidents that occurred here was in September of 1991.

So from the school district's perspective, your Honor, it has fulfilled all of its requirements with regard [17] to training. That is our obligation, to train the employees. It's undisputed that there's no allegation here there was a problem with any supervision, no allegation the policy was inadequate. In fact, the record is clear that the policy in training is in accord with the requirements of New York State Social Services Law and New York State Educational should be adequate as a matter of law. And therefore, summary judgment should be awarded in this case on behalf of Clarkstown Central School District.

One other item I'd like to bring out. That is, even assuming that Nurse O'Connor, as we do know, because we believe, quite frankly, Nurse O'Connor and Helen Doychak acted appropriately and did what they were required to do by statute as mandated, even assuming Nurse O'Connor did not have reasonable cause to suspect, it's clear if she did not and acted contrary, the school district's policy, that being the case she was acting beyond her authority as an employee.

THE COURT: I'm shocked you would even suggest that.

MS. FRAZER: Hard to believe.

THE COURT: I'm afraid you represent an insurance carrier.

MS. FRAZER: Well, your Honor, for the moment I'm representing the Clarkstown Central School District.

THE COURT: I understand.

[18] MS. FRAZER: Obviously, your Honor, understand the point I'm making in this particular case.

THE COURT: You owe some duty of support to your employees.

MS. FRAZER: Absolutely correct, your Honor, That's why —

THE COURT: I don't even want to hear that argument.

MS. FRAZER: That's why we provided the training.

Assuming there was some, your Honor, constitutional act in this case, we think the law is clear in one instance of unconstitutional conduct by one of its employees, does not plead to municipal liability on the part of Clarkstown Central School District. I point to *Stark versus Westchester County.*

THE COURT: Mr. Baumgartner, you may be heard.

MR. BAUMGARTNER: Thanks.

Good morning, your Honor.

I would first like to inform the Court that neither I nor my law firm is the author of the complaint in this action. We became counsel in this matter in November. The action was started long before then, so I cannot state with certainty why everything was brought into the complaint.

However, we're making claims that there was a violation of the due process clause of the Fourteenth [19] Amendment, Fourth Amendment and Ninth Amendment to the Constitution.

THE COURT: Please enumerate for me, please show to me whether there is any basis, assuming this Court finds they comply totally with the state-affirmed obligations imposed upon them by the sovereign State of New York, failure of which might constitute a misdemeanor, how can that be a due process violation under the Fourteenth Amendment?

This is a law of general application which applies to everybody in a posture as a school nurse everywhere in the state. And if they were in compliance with their duties imposed on them by the New York legislature, it's hard for me to imagine there's some inchoate, unexpressed provision in the Fourteenth Amendment that makes that unconstitutional.

MR. BAUMGARTNER: I would like to hand up, and I admit that I just gave a copy of this to my adversary when I came into the courtroom about an hour ago, a decision by Judge Broderick.

THE COURT: Who is he?

MR. BAUMGARTNER: Southern District of New York.

THE COURT: Is his first name Vincent?

MR. BAUMGARTNER: Yes, sir.

THE COURT: He's a very fine gentlemen. His [20] chambers are upstairs.

MR. BAUMGARTNER: Yes, sir.

THE COURT: Why are you handing it to me?

MR. BAUMGARTNER: Because it's not a recorded decision.

THE COURT: It has no precedential value. I would read it out of interest, but it has no precedential value.

MR. BAUMGARTNER: As a Southern District decision.

THE COURT: Read Moore on federal practice. Has no value at all. The Court would be glad to see it.

MR. BAUMGARTNER: Thank you.

THE COURT: This Court is only bound by the Supreme Court of the United State and the Second Circuit. That's all.

MR. BAUMGARTNER: Yes, sir.

MR. BAUMGARTNER: I would point out —

THE COURT: You know I'm always interested in what Judge Broderick thinks.

MR. BAUMGARTNER: Judge Broderick cites Supreme Court cases.

THE COURT: You can argue from the Supreme Court cases.

MR. BAUMGARTNER: In that particular decision in that particular case *Beck versus Westchester*, the New York State guidelines and the Westchester County guidelines on [21] child abuse reporting were considered by the court. The argument that

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I made in my papers and the decision of Judge Broderick in that particular case is, that there were no provisions in these particular guidelines for instructing any of the people who have to make any reports on the potential for committing constitutional violations of invasions of privacy, of intrusions into family life, or anything of that nature and because of that, they were constitutionally deficient.

Judge Broderick wrote this decision in 1990 and in that decision he expressed a belief that based upon this decision, that the State of New York and the County of Westchester would change their guidelines to take into account these necessities for protecting the privacy interest of people who could be subject to the abuse of a child abuse investigation. The requirement of the New York State statute is reasonable cause. Reasonable cause is not stated or not defined in the statute.

THE COURT: Those words are well-known to common law.

MR. BAUMGARTNER: I agree, your Honor.

THE COURT: Reasonable cause is facts which would permit an impartial person informed of those facts to have a reasonable belief that the law had been violated.

MR. BAUMGARTNER: I agree, your Honor, that that's [22] what it says, and I don't believe that is the reasonable cause that my client- received or the due process that was required that my clients received. The facts are not exactly as the defendants have made them out to be.

THE COURT: If the facts are misstated by your adversary this morning, you really must point that out to me.

MR. BAUMGARTNER: I will, your Honor, and it is in my papers.

In the first instance, there was a report to CPS by Sister Helen Doychak, a copy of the oral report given over the telephone is attached to my papers. That oral report states as a basis for the report, two black eyes to the came child. There is no indication in that report of any hand print.

THE COURT: Hand print was on another child?

MR. BAUMGARTNER: Yes, but one of the black eyes was on one of the other children, also.

THE COURT: Yes.

MR. BAUMGARTNER: In any event, when they made their report to CPS, they stated the basis for their belief that there was child abuse. The only things noted by CPS were these two black eyes. There was no mention of a hand print.

Now, as we go back in time and as you read the [23] testimony of Nurse O'Connor in her deposition, she states specifically, and its in my paper, that at the time of the hand print, he was well aware she had to make a report of child abuse, if she suspected it. It's also in my papers cited to her deposition testimony, that at the time of the first black eye, that she was well aware that she had to make a report.

THE COURT: And she did not?

MR. BAUMGARTNER: She did not.

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THE COURT: Isn't it true that the second black eye, assuming the truth of it, or the hand or something following the hand print, can be judged in light of the prior facts known or believed?

MR. BAUMGARTNER: Perhaps, your Honor, but we have —

THE COURT: It's like the story of Robinson Crusoe. When they found the second footprint, they were pretty sure there was a human being on the island.

MR. BAUMGARTNER: That's all well and good, but there's doubt as to whether this first incident ever occurred to begin with, which I would get into in a minute.

More to the point, after this third black eye to the second child six months after the first black eye, they don't do anything that day.

The nurse calls the child down to the office, she [24] talks to him, asks him: How did you get your black eye.

He tells her: I was playing football with my cousin from Staten Island, a different cousin. They happen to both be from Staten Island. There is an affidavit from young Joseph Clark that states that. They call down his brother Michael who's also in the school, the principal does, and she talks to both children.

Separately and apart, both children separately and apart tell her: My brother got it playing football with my cousin from Staten Island. The 16th of December, nobody does anything. The nurse tells young Nicholas, the kid with the black eye, tell your

father to take you to the doctor, sends him home, nothing wrong. It's not until the next day, more than 24 hours later, without any further inquiry of anyone, that this report is made.

THE COURT: What do you derive from that, they were thinking it over?

MR. BAUMGARTNER: No exigent circumstances. They were thinking it over but didn't, as they were required by the guidelines, speak to each one of the children's different teachers. Had they done that, had Nurse O'Connor spoken to the teacher for Nicholas, she would have found out Mrs. Clark was in that day. The teacher for Nicholas asked Mrs. Clark how did he get a black eye. Mrs. Clark said he got it playing football, that the teacher believed Mrs. [25] Clark and had no problem with that. This is a person who knew Mrs. Clark, had seen her often, knew the child on a daily basis in the classroom. They didn't take this step required by their guidelines to talk to the teachers, if they're not the reporter.

They didn't talk to Michael's teacher. They didn't talk to the Clarks. Now, Mr. Clark is a Rockland County police officer. Mr. Clark had gone to the school on previous occasions and been a Halloween awareness counselor to the entire school. He came to the school on a regular basis to help them on pizza day on Friday handing out pizza. It's not like these were unknown people. They could have done something other than make this particular report.

Now, if they look at, first of all, what they knew on the 16th of September or the 17th of September, which we have to gauge by what they told CPS, they only reported two black eyes to the same child which was totally incorrect. There was two black eyes

to two separate children and this alleged hand print, we believe, was a fabrication.

The only evidence of this hand print is Mrs. Barile, who is a personal friend of Nurse O'Connor, a handwritten unofficial note that Nurse O'Connor wrote and miraculously kept after Joseph, the child with this hand print, graduated from the school. This is the only testimony as to the hand print. They didn't even tell CPS [26] about it. So we don't really believe that they had any reasonable cause to suspect that child abuse was occurring, that Nurse O'Connor had any reasonable cause.

But all of that aside, she didn't follow the guidelines because she didn't talk to the teachers, she didn't talk to the parents. It was clearly not an exigent situation because they sent the kids home. If they were worried about them being abused, why would they send them home and wait a full 24 hours before starting this particular procedure? It totally amazes me.

No exigent situation. No talking to the parents. And Judge Broderick, by the way —

THE COURT: I don't want to hear anymore about Judge Broderick. Please understand, Judge Broderick has a commission to the President of the United States. It's the same size as mine. And this motion you've given to me is on a summary judgment motion where he particularly describes his views as tentative.

Regardless of what he said, I won't be bound by it. I told you that.

MR. BAUMGARTNER: I understand.

THE COURT: When you keep coming back and back to Judge Broderick, that's really a waste of my time and yours.

MR. BAUMGARTNER: Yes, sir.

I would also point out New York State Syllabus is [27] not the law.

THE COURT: No, it is some expression of New York public policy, isn't it?

MR. BAUMGARTNER: Not by the legislature.

THE COURT: They have the right to change it if legislature can offer it differently.

MR. BAUMGARTNER: The definition that they give of reasonable cause of any possibility, anytime anyone sees a child with an injury, unless they saw the injury actually performed, gives rise to reasonable cause in their definition and clearly, I don't think that's sanctioned by the Constitution.

THE COURT: Don't you think the New York State legislature, if it were specific about it, could say that any school perceiving any physical injury to a child must report it to an investigator body, period, whether the child slipped and fell or whatever.

You don't think the state has the power as a parens patriae to do that?

MR. BAUMGARTNER: Not if it invades the right of the family, not without any reasonable cause to believe that —

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THE COURT: Children have always been special wards of the state. The state has always had the right to intervene for the benefit of the children, even before the [28] common law, even before the revolution they could do it. To say that the Fourteenth Amendment took away the right of a state to do that, strikes me as absurd.

MR. BAUMGARTNER: I 'm not saying it takes away the right of the state to do that, Judge, but there has to be some objective basis in order to invade the privacy of a person.

THE COURT: Blood on the face, black eye, bruises, anything that's untoward. I don't say the state has done this, but I think the state would have the power under the Constitution to say that every injured child who shows up in the schoolhouse has to be investigated.

MR. BAUMGARTNER: I also believe that the state has an affirmative duty to instruct their employees that they should not lightly do this and there are constitutional invasions of privacy that should not occur.

THE COURT: I think I've heard enough, and I think I ought to resolve the matter. Please take your chair.

The Court assumes familiarity of everybody with all of the underlying papers and proceedings in this case and all the exhibits attached to the motion papers.

The Court assumes the familiarity of the reader with all of the papers and proceedings which are presently before the Court in these manifold papers, including also the numerous documents and exhibits attached to it and also [29] full

familiarity of the reader with all of the prior proceedings in the case which have resulted in 39 separate docket entries.

This is a federal civil rights case brought under Section 1983 of Title 42. There are annexed to the case a large number of claims arising under state law. This Court is not commenting on those claims which even include defamation, and I have decided that I'm not required to do so because it's quite clear that if the Court grants summary judgment on the federal constitutional claim, in its discretion the Court should decline to exercise jurisdiction over any of the pendent claims. The authority for that is the *Carnegie Mellon University against Cohill*, 484 U.S. 343 at 350 and *DeLaura against the Power Authority*, a Second Circuit case decided in 1992.

There are presently before the Court three separate motions for summary judgment, but one is a motion by the third-party defendants, Archdiocese of New York, St. Augustine School and Sister Helen Doychak, sued as Boychak, for summary judgment, October 8, 1994 before Judge Goettel of this court, which were not heard or decided, a so-called cross motion by defendant Helen O'Connor for summary judgment and sanctions filed October 5, 1994 and a motion by the defendant/third-party plaintiff Clarkstown Central School District summary judgment docketed December 1994, [30] although it's dated October 6th.

The underlying factual background, to the extent relevant to the decision of this court, appears to be generally as follows:

The plaintiffs, Roseann Clark and Joseph Clark, as individuals, and Roseann Clark on behalf of the infants Nicholas Clark and Michael Clark, filed this civil rights action on December 15, 1992.

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Some of the original named defendants have been discontinued or dismissed. Ms. Helen O'Connor, the defendant here, is a school nurse for the school district. The subject matter of the lawsuit arises out of a child abuse investigation which the plaintiffs allege was conducted or initiated by defendants in bad faith and wanton disregard of their rights arising out of the Constitution of the United States.

It's also contended there is a custom policy and practice of the Clarkstown Central School District and their employees to conduct initial phases of child abuse investigations, generally in a matter contrary to the constitutionally-protected rights of the children and the parents or custodians and guardians. A notice of claim was filed with the school district in 1991.

The Rockland County Child Protective Services, as I think was mentioned earlier, was dismissed by Judge Goettel [31] back in 1993. All the discovery in this matter has been concluded. The Court finds there are no significant issues of disputed material facts which affect the federal constitutional claims. I'm not expressing any opinion as to the state pendent law claims. All parties seem to agree Helen O'Connor was a school nurse employed by the Central School District, Clarkstown, and she was assigned to work at St. Augustine's Roman Catholic School in New York.

And on September 16, 1991, she questioned the infant plaintiff, Nicholas Clark, about a black eye and was told by the student that the injury occurred while he was playing football with his relatives from Staten Island on a prior weekend.

Ms. O'Connor was well and favorably known to Sister Helen Doychak, who apparently was the person in charge of the

school operations at the time and place involved in this lawsuit, and Sister Helen Doychak had reason to believe that Ms. O'Connor was truthful and experienced and understood her obligations as a school nurse and reasonably could rely upon anything told to her by Helen O'Connor.

On September 17th, a day later, Helen O'Connor made a report to the principal of the school, Sister Doychak, that the plaintiff's parents were suspected of child abuse or maltreatment. That's Exhibit 1 to the plaintiff's Rule 3(g) statement and, thereafter, the student, the injured [31] student and his brother were taken out of their classes and questioned by the nurse and by the principal, Sister Helen, and by an official of the Rockland County Child Protective Services and they were photographed and asked about details of their home and family life.

Thereafter, the matter came fully into the hands of the — the County Child Protective Services, which is not presently before the court and that unit conducted an internal investigation. The files and proceedings in that case are not presently before the court. They are presumed to be valid. That body found that there was no basis for maintaining or continuing a child abuse investigation of the plaintiff, and that the report of the abuse was unfounded, in fact. Thereafter, the parents removed the children from St. Augustine School and enrolled them in school elsewhere.

Central allegation to the constitutional claim here is and has to be that the report made by the nurse and the report made by the principal and the actions they took in connection therewith, were undertaken without just cause or in gross negligence or in bad faith or additionally, if that be so, that their actions demonstrated

inadequate training on the part of the school itself or the Archdiocese or the District, respectively, and the complaint alleges that the infant plaintiffs and their parents were seriously damaged emotionally and otherwise suffered humiliation and emotional [33] distress and all the other things which go with a constitutional violation in a case of this sort.

There is no evidence before this Court in the vast submission of papers upon which a reasonable person could conclude that the individual defendants or third-party defendants acted with malice or as a result of inadequate training, such as would rise to a level of an issue of material fact.

As I mentioned earlier, the discovery has been concluded. There is evidence to the contrary. The individual defendants had prior knowledge either persona or through hearsay of prior incidents which were alleged to have occurred, which were not at the time perceived as a basis of a report but which would serve as a context in which the current report was made and as a basis of fact which would substantiate the initial report and assist in completing the total picture, which ordinarily would constitute reasonable cause to suspect the abuse, and the Court finds there was reasonable cause to suspect child abuse.

On March 4, 1991 the older brother had come to the nurse's office with a black eye which he sustained while playing ball with his cousin on Staten Island. Apparently, there's different cousins on Staten Island who gave these respective black eyes, but that was not known to the [34] defendants.

On June 21, 1989, Ms. O'Connor made a handwritten note of a report of a hand print. There's no reason to believe this document is contrivance or forgery. There have also been

incidents involving the child Joseph involving poor behavior at school and poor grades, so-called mooning incident. That kind of acting out at school is today perceived by professionals in the field as being consistent with child abuse or neglect.

The explanation of the black eye in the context of the prior issues is somewhat suspect on its face. Of course, this Court does not have to reach the merits of underlying controversy in order to resolve this motion and as I noted earlier, the body charged with doing the investigation, the Child Protective Services of Rockland County, found that there was no abuse or evidence of abuse.

This Court is entitled to consider the law of the State of New York applicable to these situations and under New York law, which is amplified fully in the submitted papers, school officials, including school nurses and principals, are required to report or cause a report to be made when they have reasonable cause to suspect the child is an abused or maltreated child.

That's found in New York Social Services Law Section 413, and this statute reflects the public policy of [35] the State of New York and effects a serious matter of public interest. This Court should not lightly assume good-faith compliance with that statute would be a basis or predicate for a claim of violation of federal constitutional rights.

The statutes require whenever a school official has reasonable cause to suspect child abuse or maltreatment, he or she shall immediately notify the person in charge of the school in this case, Sister Doychak, who is then also responsible for reporting or causing a report to be filed on the statutory scheme.

It is particularly noteworthy that willful failure to report is a Class A misdemeanor under New York, and such a failure may also give rise to civil liabilities under Section 320 of the New York Social Services Law. The statute particularly provides that any person who in good faith makes a report of suspected child abuse or maltreatment, is entitled to statutory immunity from both civil and criminal liability.

It is within the power of the sovereign State of New York to make this type of a legislative grant of immunity. Absent a showing of willful misconduct or gross negligence, both federal and state law recognizes a presumption that a person is acting in good faith and that presumption of good faith, which is statutory in New York under Section 419, has been upheld by the New York and [36] federal courts, and that there are cases cited in support of that proposition.

It's based not on actual or conclusive proof of abuse but on a reasonable cause to suspect such abuse. The Board of Education's statement of policy implementing the requirements of the statute require a school official or his or her designee to report when there's reasonable cause to suspect abuse or maltreatment.

And those words are words of art known to the common law and that policy also provides for the presumption of good faith in all civil or criminal proceedings and immunity from liability.

I'm relying on Exhibit B-10 to the school district's motion, and Exhibit 3-A of the plaintiffs Rule 3(g) statement.

It's undisputed this policy and New York reporting law, which resulted in the promulgation of the local policy, applies to

the individual defendants and it clearly imposed upon them a legal duty to avoid criminality to make the report and conferred upon them good faith immunities for so reporting.

The syllabus includes reasonable cause as a situation where a person observes or is told about a suspicious instance and that it was possible that the injury was caused by non-accidental means.

[37] The questions are sought to be raised here as to the validity of the sources of knowledge, the nurse and principal and the adequacy of this proof of abuse. However, it must be remembered that these individual defendants had no independent duty to investigate the situation, to assess absolute certainty, and a person who is required to report under New York law or under the training program, is entitled to statutory immunity in New York simply by participating in good faith in reporting suspected child abuse and need not make the report predicated upon actual or conclusive proof. The Court is relying on *Isabelle against The City Of New York*, a First Department case in New York and the *Kempster* case in the Second Department in 1987.

In matters involving potential child abuse investigations, Federal Courts have also held that the reporters of abuse are entitled to qualified immunities in subsequent lawsuits under Title 42 of the United States Code Section 1983.

This is exactly such a case. The Court relies on *Cecare against The City of New York*, Second Circuit case decided in 1992, *Robinson* decided by the Second Circuit in 1987, which held that there was qualified immunity and where it was objectively reasonable for the defendants to believe that their actions were lawful.

Appendix A

This Court finds and concludes, as a matter of law, [38] that the record presently before the Court, on its face, taking into account all of the documentary evidence and deposition testimony, establishes as a matter of law that individual defendants acted in objective good faith and indeed, as they were required to do, as their statutory duty of New York law required them to do under the pain of criminal prosecution and as a result of that good faith which is presumed and there's no substantial evidence to the contrary which would justify a reasonable juror from finding otherwise.

Therefore, they enjoy qualified immunity. The legal obligation to report conferred upon them is an immunity from any liability which might result from their action taken in good faith. And as I said earlier, such good faith must be presumed in the absence of evidence to the contrary, and there is none.

This Court does not have to consider whether the suspicions of child abuse in this case were or were not wholly without foundation. The proper authority for doing that is the Child Protection Services Agency. And as I noted earlier, that agency investigated the matter, found on facts not presently available to either this Court or to the litigants, that the report turned out to be unfounded.

This Court need find and finds only there is evidence sufficient to constitute reasonable cause to [39] suspect abuse or maltreatment. On the totality of the facts known to the persons who made the report, and no evidence whatever to suggest that the report was not made by the defendants in good faith and the reasonable perception of their statutory duty, as noted earlier, if they failed to do it, they might have been civilly liable and guilty of a Class A misdemeanor.

Appendix A

I want to emphasize that these individuals were only required to report their suspicions and not to investigate further, as this latter function was delegated to the CPA and was, in fact, performed by that organization. The reporting people, however, were entitled to confirm their suspicions and to protect the record by further inquiry of the child and by pictures, even though that might be somewhat intrusive, viewed in hindsight.

And the Court finds that in taking the efforts to verify their suspicions by speaking with the child, they did not violate the child's constitutional rights or those of the parents.

The Court also concludes this is a very serious matter of public policy, and protecting children from child abuse outweighs any privacy interests of the family which may exist under the Constitution.

The Court concludes that the danger to an individual, to a child, of possible physical injury, as a [40] permanent nature or even possible loss of life by a child who may be the victim of abuse or neglect, has no means of protection or recourse to the authorities otherwise as a practical matter is very real in this day and age and the state has a genuine interest in the welfare of children, which is reflected in its statutes as parens patriae and includes the right to require health care of children notwithstanding the parents' wishes, and require the education of children, notwithstanding the wishes of parents, and protect the children from the risk of injury at the hands of their parents or others. And that these important public policy interests far outweigh the rights of the parents to have privacy or due process or anything else cited here in this case.

This Court must uphold the increasing efforts of the State of

New York to safeguard the interest of children and support good faith efforts of school officials to be vigilant to and aware of this hidden problem, even though it may result occasionally in some detriment to the innocent.

Unfortunately, children do not occupy the preferred position in most families which they enjoyed during the 19th century. And under current attitudes and mores, it is commonplace children are killed or suffer serious mistreatment at the hands of their own blood, their own parents.

[41] The state, as I said earlier, has a right to do something about this. The efforts of the state officials and school teachers and the nurses should not be hindered by their own fears of personal liability in cases where, for whatever reason, the charges are later not pursued or are deemed unfounded.

To hold otherwise in this case would set a very dangerous precedent that would interfere with the duly adopted policies of the legislature of the State of New York, elected by the citizens of New York who made a determination in promulgating the reporting mandates and in granting immunities for persons making reports in good faith.

Moreover, the state imposed requisites of due process in investigating or acting upon reported abuse, is regarded by the Court as an adequate safeguard of the rights of the parents and the children and the family unit. There is no due process violation in this case because the process established, procedures established by the State of New York are lawful and adequate within the scope of the federal Constitution and those procedures were essentially followed.

And as I noted earlier, there was an investigation and charges were ultimately dropped as lacking merit. At no time were the children removed from the custody of their parents or were any disciplinary or criminal actions taken [42] against the parents. A mere photographing and questioning of Nicholas Clark is not regarded as rising to the level of constitutional violation, and the Court does not believe that there needed to be prior notification of his parents, nor was that search within the Fourth amendment.

I find no violation of the procedural due process of the children or the parents under the Fourteenth Amendment and no violation of their rights to privacy within the protected sphere of family relations. The Court relies on the Second Circuit case of *Van Emrick* (ph) and there they took x-rays of a child without parents' consent and, apparently, in the excess of the scope of the statute, but they were held entitled to qualified immunity. The question of whether there was a constitutional violation in the first place is, of course, a separate issue from the issue of qualified immunity.

This Court finds basically that the individual defendants enjoyed qualified immunity in the case and that also, if they're wholly without regard from immunity, there's no evidence of constitutional violation.

This Court is considering only the federal claim pleaded. As I mentioned earlier, the Court should not and, in my judgment, ought not to reach the merits of the state law claims. The Court doesn't think they have much merit, but that better be left for the state courts to interpret [43] the applicable statutes. Therefore, the final judgment to be entered here will be without prejudice as to this pendent state law claims.

Appendix A

There's a request for sanctions pursuant to Rule 11. It's been pointed out to the Court that Mr. Baumgartner is not the guilty party in having drawn the offending pleading in this case.

The Court does not believe that on the totality of the facts there should be any sanctions granted. So that particular part of the motion is denied.

In all other respects, the three motions for summary judgment are granted.

The Court dismisses as to all remaining defendants, all claims pleaded which arise under federal statute and the pendent state claims are dismissed without prejudice.

The foregoing constitutes findings and conclusions of the Court and the Court's oral decision on this issue.

The Court recognizes that counsel may wish to seek appellate review in the matter, and in order that you can each enjoy a full record, the Court will now invite counsel, one at a time, to request the Court to make any additional findings or comments which would make a total record.

Essentially, on these facts, there's no material fact which is in dispute. There is no constitutional violation by anybody of the federal Constitution and if [44] there would be found a violation of a federally-protected right, the individual defendants would enjoy qualified immunity and there would be no respondeat superior obligation as to the federal claims insofar as concerns the corporate defendants.

Now, I'd like to begin with you, Ms. Frazer. Is there something else you want added?

MS. FRAZER: No, your Honor.

THE COURT: All right. How about you, Mr. McMorrow?

MR. MC MORROW: No, your Honor, thank you.

THE COURT: Mr. Eustace?

MR. EUSTACE: If it please the Court, to clarify the record, when you stated in your dictation, your Honor, that the individual defendants are presumed to have acted in good faith and had the immunities, that, I imagine, incorporated — included the third-party defendant as well?

THE COURT: As I understand it, yes, the third-party defendant. I meant all defendants.

MR. EUSTACE: Thank you.

THE COURT: I'm sorry if there was any ambiguity.

MR. EUSTANCE: That's what I understood.

THE COURT: I'm talking about all the human being defendants.

MR. EUSTACE: Thank you.

[45] THE COURT: Mr. Baumgartner, anything further you want the Court to add?

MR. BAUMGARTNER: No, thank you, your Honor.

THE COURT: All right. The Court directs the clerk to enter judgment in accordance with the Court's decision.

Thank you very much for your attendance here today.

(At 11:45 a.m., the proceedings were concluded.)

CERTIFICATE

I, ANGELA A. O'DONNELL, a Registered Professional Reporter and Notary Public of the State of New York, do hereby certify that the transcript of the foregoing proceedings, taken at the time and place aforesaid, is a true and correct transcription of my shorthand notes.

s/ Angela A. O'Donnell
ANGELA A. O'DONNELL, RPR

APPENDIX B — RELEVANT STATUTES

Social Services Law § 411

§ 411. Findings and purpose

Abused and maltreated children in this state are in urgent need of an effective child protective service to prevent them from suffering further injury and impairment. It is the purpose of this title to encourage more complete reporting of suspected child abuse and maltreatment and to establish in each county of the state a child protective service capable of investigating such reports swiftly and competently and capable of providing protection for the child or children from further abuse or maltreatment and rehabilitative services for the child or children and parents involved.

Social Services Law § 413

§ 413. Persons and officials required to report cases of suspected child abuse or maltreatment

1. The following persons and officials are required to report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child, or when they have reasonable cause to suspect that a child is an abused or maltreated child where the parent, guardian, custodian or other person legally responsible for such child comes before them in their professional or official capacity and states from personal knowledge facts, conditions or circumstances which, if correct, would render the child an abused or maltreated child: any physician; registered physician assistant; surgeon; medical examiner; coroner; dentist; dental hygienist; osteopath; optometrist; chiropractor; podiatrist;

resident; intern; psychologist; registered nurse; hospital personnel engaged in the admission, examination, care or treatment of persons; a Christian Science practitioner; school official; social services worker; day care center worker; provider of family or group family day care; employee or volunteer in a residential care facility defined in subdivision seven of section four hundred twelve of this chapter or any other child care or foster care worker; mental health professional; substance abuse counselor; alcoholism counselor; peace officer; police officer; district attorney or assistant district attorney; investigator employed in the office of a district attorney; or other law enforcement official. Whenever such person is required to report under this title in his or her capacity as a member of the staff of a medical or other public or private institution, school, facility or agency, he or she shall immediately notify the person in charge of such institution, school, facility or agency, or his or her designated agent, who then also shall become responsible to report or cause reports to be made. However, nothing in this section or title is intended to require more than one report from any such institution, school or agency. At the time of the making of a report, or at any time thereafter, such person or official may exercise the right to request, pursuant to paragraph (A) of subdivision four of section four hundred twenty-two of this article, the findings of an investigation made pursuant to this title or section 45.07 of the mental hygiene law.

Social Services Law § 413 (subdivisions 2 and 3)

§ 413 (subdivisions 2 and 3)

2. Any person, institution, school, facility, agency, organization, partnership or corporation which employs persons mandated to report suspected incidents of child abuse or

maltreatment pursuant to subdivision one of this section shall provide consistent with section four hundred twenty-one of this chapter, all such current and new employees with written information explaining the reporting requirements set out in subdivision one of this section and in sections four hundred fifteen through four hundred twenty of this title. The employers shall be responsible for the costs associated with printing and distributing the written information.

3. Any state or local governmental agency or authorized agency which issues a license, certificate or permit to an individual to operate a family day care home or group family day care home shall provide each person currently holding or seeking such a license, certificate or permit with written information explaining the reporting requirements set out in subdivision one of this section and in sections four hundred fifteen through four hundred twenty of this title.

Social Services Law § 419

§ 419. Immunity from liability

Any person, official, or institution participating in good faith in the providing of a service pursuant to section four hundred twenty-four of this title, the making of a report, the taking of photographs, or the removal or keeping of a child pursuant to this title shall have immunity from any liability, civil or criminal, that might otherwise result by reason of such actions. For the purpose of any proceeding, civil or criminal, the good faith of any such person, official or institution required to report cases of child abuse or maltreatment or providing a service pursuant to section four hundred twenty-four of this title shall be presumed, provided such person, official or institution was

acting in the discharge of their duties and within the scope of their employment, and that such liability did not result from the willfull[1] misconduct or gross negligence of such person, official or institution.

Social Services Law § 420

§ 420. Penalties for failure to report

1. Any person, official or institution required by this title to report a case of suspected child abuse or maltreatment who willfully fails to do so shall be guilty of a class A misdemeanor.

2. Any person, official or institution required by this title to report a case of suspected child abuse or maltreatment who knowingly and willfully fails to do so shall be civilly liable for the damages proximately caused by such failure.

Education Law § 3209-a

§ 3209-a. Child abuse prevention

Each school district of the state shall: (1) develop, maintain and disseminate written policies and procedures pursuant to title six of article six of the social services law and applicable provisions of article ten of the family court act, regarding the mandatory reporting of child abuse or neglect, reporting procedures and obligations of persons required to report, provisions for taking a child into protective custody, mandatory reporting of deaths, immunity from liability, penalties for failure

---

1. So in original.

to report and obligations for the provision of services and procedures necessary to safeguard the life or health of the child; and (2) establish, and implement on an ongoing basis, a training program for all current and new school officials regarding the policies and procedures established pursuant to this section.

8 N.Y.C.R.R. § 57.4(a)

§ 57.4 Responsibilities of providers.

(a) Pursuant to the requirements of sections 3003(4), 3004, 3007, 5003, and 6507(3)(a) of the Education Law, a provider, at a minimum, shall offer the syllabus prepared by the department. However, nothing in this section shall preclude providers from offering additional coursework or training which exceeds, or expands upon, the two hour syllabus prescribed by the department.

Supreme Court, U.S.
FILED
MAR 18 1996
CLERK

No. 95-1146

In The

Supreme Court of the United States

October Term, 1995

ROSEANN CLARK and JOSEPH CLARK, and INFANT NICHOLAS CLARK and MICHAEL CLARK, by their mother, ROSEANN CLARK,

Petitioners,

vs.

CLARKSTOWN CENTRAL SCHOOL DISTRICT, and HELEN O'CONNOR, individually and in her official capacity as an employee of the CLARKSTOWN CENTRAL SCHOOL DISTRICT, ARCHDIOCESE OF NEW YORK, ST. AUGUSTINE SCHOOL, HELEN BOYCHAK as Principal of St. Augustine School, and as employee of ARCHDIOCESE OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT HELEN O'CONNOR, ETC.

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QUESTION PRESENTED

Whether certiorari should be granted where the district court properly granted summary judgment, pursuant to Fed. R. Civ. P. 56(c), finding no genuine issue of material fact, thereby, entitling Respondents to judgment as a matter of law.

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OPINIONS BELOW

On January 31, 1995, the Honorable Charles L. Brieant, United States District Court for the Southern District of New York, issued an order granting the motions of all Respondents for summary judgment, pursuant to Fed. R. Civ. P. 56(c), finding no genuine issue of material fact, thereby dismissing all federal claims as well as pendent state claims.

Petitioners appealed from said order and on October 13, 1995, the United States Court of Appeals for the Second Circuit denied Petitioners' appeal finding that all Respondents had acted with "reasonable cause" and that no genuine issue of material fact existed.

A copy of the original judgment of the district court as well as the order of the Court of Appeals is already set forth in Petitioners' appendix.

The verbatim transcript of the oral decision of the Honorable Charles L. Brieant, United States District Judge, is set forth in Respondent's, Clarkstown Central School District, appendix

STATEMENT OF THE CASE

Respondent, Helen O'Connor, (hereinafter referred to as "Mrs. O'Connor"), is a registered nurse licensed by the State of New York and had been employed by the Clarkstown Central School District, (hereinafter referred to as "District"), for approximately sixteen years prior to the events contained in the complaint.

From 1981, Mrs. O'Connor had been assigned as a school nurse to the Roman Catholic elementary school, St. Augustine,

which is operated by Respondents, Archdiocese of New York, hereinafter referred to as "Archdiocese". Under New York law, a school district is required to provide a registered nurse, on a full time basis, to every school within its jurisdiction.

It is undisputed that New York State has enacted certain laws with respect to the prompt reporting and handling of child abuse situations. Those statutes are codified under New York's Social Services Laws § 413 *et seq*. The constitutionality of New York's Social Services Laws *have not been challenged* by Petitioners in these proceedings.

The precise language of the Social Service Laws is set forth in Respondent District's appendix.

It is undisputed that under Social Service Law § 413(1), school nurses, as well as other professional individuals, are required to report or cause a report to be made when they have "reasonable cause" to suspect that a child may be abused or maltreated. Under Social Service Laws § 419, a school nurse making such a report of suspected child abuse in "good faith" is entitled to immunity from both civil and criminal liability. Most importantly, a school nurse who failed to report an appropriate child abuse situation would face criminal penalties as well as civil penalties under Social Service Laws § 420.

Petitioners, Roseann Clark and Joseph Clark, Sr., enrolled their three children at St. Augustine's school. The eldest, Joseph, Jr., Michael, and the youngest, Nicholas. Over a three year period, Mrs. O'Connor had become aware of a pattern of injuries and situations which had befallen two of the Clark children.

This began on June 21, 1989, when Mrs. O'Connor was advised by the teacher of Joseph, Jr. as well as the principal of the

school that they both had observed Joseph, Jr. arrive in the school with what appeared to be the remnants of a large handprint on his face. The principal instructed Mrs. O'Connor to make a note of that situation in the child's medical file and she did. On March 4, 1991, the same child, Joseph, Jr., had arrived at the school in the company of his parents for a meeting with the principal concerning a "mooning" incident in which Joseph, Jr. had been involved previously on a school bus. At that time, Joseph, Jr. had a large black eye. Following that meeting, Joseph, Jr. came into Mrs. O'Connor's nurse station at the school and complained of pain from the black eye. Joseph, Jr. advised that he had received this injury while involved in a sporting event with a cousin from Staten Island, New York. Mrs. O'Connor made notes in his medical records concerning this event.

Finally, on September 16, 1991, the youngest Clark child, Nicholas, was observed in school with a large black eye accompanied with serious swelling. Mrs. O'Connor asked Nicholas how he received the black eye and he explained that he was playing a sporting event with a cousin from Staten Island, New York. The statement of Nicholas was almost the exact excuse which had been provided by his oldest brother, Joseph, Jr., just six months earlier.

Based upon the deposition testimony of the Petitioners, it is undisputed that Joseph, Jr. had suffered the black eye in March of 1991 and that it was in very close proximity to the "mooning" incident. Further, it is undisputed that the youngest child, Nicholas, had the black eye in September of 1991. There was no controversy concerning the fact that both children stated they received those injuries as a result of playing with a cousin from Staten Island, New York.

Based upon this pattern of incidents concerning the Clark children, Mrs. O'Connor approached the new principal of the

school, Respondent, Helen Boychak, and advised her of the latest incident involving young Nicholas as well as the previous incidents involving Joseph, Jr.

After considering this situation for a period of time, Principal Boychak questioned both Nicholas as well as the middle brother Michael who was also a student in the school. Both children indicated that Nicholas received the black eye while playing with a cousin from Staten Island, New York. The oldest child, Joseph, Jr., had previously graduated from St. Augustine School that past June and was no longer available to be questioned by the principal.

Principal Boychak called the 1-800 hotline number in New York for child abuse situations. She made that call in the presence of Mrs. O'Connor, and, Principal Boychak related the history of events to the spokesperson for New York's Child Protection Agency and inquired as to whether or not this was the type of situation which should be reported. Principal Boychak was advised that this was a situation which required a report and the principal was advised to call a local number for the Rockland County Child Protection Services and discuss the situation directly with them.

Principal Boychak made that follow up call and shortly thereafter a representative from CPS came to investigate the situation at the school. That investigator, spoke briefly with Principal Boychak and with Mrs. O'Connor and then separately interviewed Nicholas Clark and Michael Clark. Following those interviews, the investigator left and did visit the home of the Clark family that evening and made inquiries of both Roseann Clark and Joseph Clark, Sr.

That investigation went forward for approximately six months time when it was finally closed as "unfounded". None of

the Respondents were involved in the CPS investigation. Shortly thereafter, the Petitioners commenced the federal action in the United States District Court for the Southern District of New York with a complaint alleging some 33 counts of a variety of civil rights claims as well as pendent state law claims.

In essence, the complaint alleged that the various Respondents violated constitutional rights of these Petitioners by initiating child abuse investigations without "reasonable cause" and had in fact done so with malice, gross recklessness and wilful misconduct.

Ultimately, the District commenced a third party action against Respondents' Archdiocese. Full and lengthy disclosure and discovery proceedings were conducted. Upon the conclusion of discovery, motions were filed by all the Respondents seeking summary judgment.

The motions and the accompanying exhibits were extensive and included some thirteen deposition transcripts to be reviewed by the district court. On January 27, 1995, the Honorable Charles L. Brieant, heard oral argument from all parties and granted summary judgment dismissing all federal claims with prejudice and dismissing all pendent state claims without prejudice. The verbatim transcript of the decision of the Honorable Charles L. Brieant, including his findings of fact and law, are annexed to District's appendix.

Petitioners then appealed to the United States Court of Appeals for the Second Circuit asserting that there were numerous material issues of fact to be resolved. The Second Circuit unanimously affirmed the ruling of the district court finding that Respondents had "reasonable cause" to suspect child abuse and that the actions of the Respondents had not violated any constitutional rights of privacy.

Petitioners have made numerous misstatements of fact and most have been corrected in the briefs of Respondents' District and Archdiocese. However, two additional misstatements should be addressed. On page "14" of the original petition, Petitioners' counsel suggests that Mr. Clark's employment suffered as a result of this situation since as a police officer he was later cross-examined by attorneys for persons arrested by him and the issue of the child abuse allegations were brought out in efforts to damage his credibility. Petitioners' counsel is quite incorrect in making such allegations in this petition especially in view of the fact that Joseph Clark, Sr. has already testified, under oath, that he had been listed as disabled and was no longer an active police officer since 1988 which is some three years prior to the incidents related in the complaint. Mr. Clark was no longer making arrests or being cross-examined.

Further, Petitioners' counsel stated on page "13" of the petition that Joseph Clark, Sr.'s employment suffered because he was subject to an internal departmental investigation by the chief of police. Such is simply not the case since Mr. Clark was no longer a police officer and was never formally questioned by the chief of police concerning this situation. Again, in the deposition of Mr. Clark, he explained that he was present with the chief of police during a three hour negotiation session for salary raises for the officers of the department since Mr. Clark was still an official of the union and a negotiator acting on behalf of the police union. It was only at the close of the negotiation session that the chief happened to inquire of Mr. Clark whether everything was all right at home. Such an encounter can hardly qualify as an internal affairs inquiry.

REASONS FOR DENYING THE WRIT

Respondent, Mrs. O'Connor submits that *no compelling* reasons exist in support of a grant of this petition.

The New York Court of Appeals has not decided any *important federal question* which conflicts with any other state court or of a United States Court of Appeals.

The order of the Court of Appeals for the Second Circuit affirming the grant of summary judgment *does not conflict* with any decisions of other United States Courts of Appeals or conflicts in any way with decisions of New York's Court of Appeals.

Further, the original decision of the district court granting summary judgment as well as the order affirming that decision *does not raise any important questions* of federal law that need be resolved by this Honorable Court.

This case merely relates to the granting of summary judgment upon a finding of the lack of the existence of any *material issues of fact* and such a ruling should remain undisturbed.

Neither the Constitution of the United States of America nor the Constitution of New York State or any of its respected principles are implicated by the granting of summary judgment on behalf of the Respondents.

Petitioners are not challenging the constitutionality of New York's Social Services Laws nor are they challenging the "reasonable cause" standard contained in those statutes. Petitioners fully concede that potential child abuse events must be viewed as they were at the time an investigation is initiated

rather than after the investigation has been concluded. Petitioners cannot point to any decision of this Honorable Court or any other appropriate decision of any United States Court of Appeals which is in conflict with the grant of summary judgment in this matter.

Petitioners raise as an issue that a family should have a constitutionally protected liberty interest to be free from child abuse investigations absent "reasonable cause" to suspect potential abuse. Such an issue need not be addressed by this Honorable Court since it has already been determined, as a matter of law, that all Respondents possessed the necessary requisite for "reasonable cause" to suspect potential abuse in this situation. In effect, *Petitioners actually seek an inappropriate review of the findings of fact.* The district court properly determined and the Second Circuit Court of Appeals properly affirmed that Respondents produced sufficient evidence to find that the actions of the various Respondents were undertaken *in good faith and based upon reasonable cause.* It was properly determined after a complete review of the extensive records submitted by Respondents that their actions did not amount to wilful misconduct, bad faith or gross negligence.

Petitioners failed to demonstrate that Respondents' actions violated any constitutionally protected rights, and, Petitioners utterly failed, then and now, to demonstrate the existence of any material issues of fact sufficient to disturb the appropriate granting of summary judgment.

In New York, as in many other states, it had become public policy to improve efforts to identify potential abusive situations in the hopes of improving early detection. It has been noted that the

> . . . importance of rapidly detecting and

> addressing instances of evil as pernicious as child abuse cannot be overstated.

Statler v. Larsen, 131 A.D.2d 125, 520 N.Y.S.2d 378, at 382 (1st Dept. 1987).

Toward that end, the New York Legislature requires certain professionals to register reports whenever they have cause to suspect that a child is maltreated or abused. *Title 6, Child Protective Services, Social Services Law*, § 411 *et seq.*, McKinney's Consol. Laws, book 52A, 1992. The very essence of the law recognizes that abused children are in urgent need of effective child protective services.

Section 413 provides a listing of various professionals who are required to report instances of suspected abuse. A registered nurse is one of those listed in the section as a mandated reporter of abuse. The section further provides:

> . . . . Whenever such person is required to report under this title in his or her capacity as a member of the staff of a medical or other public or private institution, *school*, facility or agency, he or she shall *immediately notify the person in charge of such institution, school*, facility or agency, or his or her designated agent, who then also shall become responsible to report or cause reports to be made.

(Emphasis provided). Social Services Law, § 413 (1), McKinney's Consol. Laws (1992).

So important is the effort to identify abusive situations that the New York Legislature provided that any person failing to

report suspected abuse is guilty of a class A misdemeanor, and, is also civilly liable for the damages. Social Services Law, § 420.

Reports of suspected abuse need not await conclusive evidence to verify the abusive condition. *Kempster v. Child Protective Services,* 130 A.D.2d 623, 515 N.Y.S.2d 807, at 809 (2nd Dept. 1987); *Isabelle v. City of New York,* 150 A.D.2d 312, 541 N.Y.S.2d 809, at 810 (1st Dept. 1989).

To promote more complete and timely reporting of suspected abusive situations, the New York Legislature provided immunity to those mandated reporters. Such immunity attaches whenever there is reasonable cause to suspect an abusive situation and whenever the mandated reporter acted in good faith in discharging the obligations and duties imposed by the statute. *See, Kempster, supra.*

Section 419 provides, in pertinent part:

> Any person, official or institution participating in good faith in . . . ,the making of a report, . . . shall have immunity from any liability, civil or criminal, . . . the good faith of any person, official or institution required to report cases of child abuse or maltreatment . . . shall be presumed, provided such person, official or institution was acting in discharge of their duties and within the scope of their employment, and such liability did not result from the willful [as in the original] misconduct or gross negligence of such person, official or institution.

Social Services Law, § 419, McKinney's Consol. Laws (1992).

Even in jurisdictions lacking a local statute such as New York's Social Services Law, the United States Court of Appeals, for the Seventh Circuit, held that school personnel and a social worker who removed a young girl from her class and questioned her and physically examined her for evidence of child abuse were entitled to qualified immunity and dismissed claims brought under 42 U.S.C. § 1983 as well as state pendent claims. Such immunity extended to subsequent questioning of the child's sister about potential abuse even after the father voiced objections. *Landstrom v. Illinois Department of Children and Family Services*, 892 F.2d 670 (7th Cir. 1990).

In matters involving potential child abuse investigations, the federal courts have recognized that reporters of abuse are entitled to qualified immunity in actions under 42 U.S.C. § 1983. *Robinson v. Via*, 821 F.2d 913 (2nd Cir. 1987); *Cecere v. City of New York*, 967 F.2d 826 (2nd Cir. 1992); *Chayo v. Kaladjian et al.*, 844 F. Supp. 163 (S.D.N.Y. 1994).

In the matter before this Honorable Court, Mrs. O'Connor was entitled to summary judgment for any claim of violation of civil rights under 42 U.S.C. § 1983 under, both, the federal standard as well as under the state standard as proscribed under Social Services Law § 419.

There can be no dispute that Mrs. O'Connor, as a registered nurse and school employee, is in fact a *mandated reporter* of suspected abusive situations pursuant to the Social Services Law. Further, she would be criminally and civilly liable for a failure to report a suspected case.

Also, there is no dispute that Mrs. O'Connor notified the principal of St. Augustine school, Sister Boychak, and that pursuant to the Social Services Law, § 413, Sister Boychak, as

the person in charge of the school became responsible to notify and did notify the Child Protective Service.

Further, there is no dispute that Mrs. O'Connor was an employee of the Clarkstown Central School District and that she became aware of the various past episodes of injuries to the Petitioners' children as a result of her employment and assignment to St. Augustine school and was acting within the proper scope of her authority when she notified the principal of the latest incident involving a Clark child.

Consequently, under the standard provided in *Title 6- Child Protective Services, Social Service Laws,* § 413 *et seq.*, Mrs. O'Connor is entitled to qualified immunity from civil litigation. Additionally, the good faith of her actions must be presumed as there is no evidence to suggest that her actions rose to a level of wilful misconduct or gross negligence.

Under the federal standard, the test of reasonableness is an objective one and the defense of qualified immunity properly lends itself to summary disposition of the various claims under 42 U.S.C. § 1983 against Mrs. O'Connor.

Additionally, there is no real dispute that Mrs. O'Connor, as the school nurse, was reacting to a collective group of incidents involving the Clark children and not responding to one lone incident involving the black eye of the youngest Clark child.

The evidence is conclusive, through testimony and admissions of the Petitioners, that Nicholas Clark, an infant, arrived at school with a black eye on September 16, 1991. It is further undisputed that Nicholas explained that he received the black eye as a result of playing with a "cousin" from Staten Island.

On June 21, 1989, Nicholas's older brother, Joseph, was observed arriving at school with the remains of a handprint on his face. This is confirmed by the uncontested deposition testimony of Joseph's teacher, Mrs. Barile. Although Mrs. O'Connor did not observe the handprint, she was told of it by both the teacher, Mrs. Barile and the then principal of St. Augustine school. She properly made a record of the event and placed it into the child's school medical record. That record was marked as an exhibit in the underlying litigation.

It is further undisputed that on March 4, 1991, young Joseph was observed leaving the principal's office in the company of his parents and Joseph had a black eye. He went to the nurse's office and explained to Mrs. O'Connor that he received the black eye playing with a "cousin" from Staten Island. It is undisputed that this was the same "cousin" his younger brother, Nicholas, would identify six months later as the source of his black eye. Again, she made a record of these incidents as well as Joseph's explanation in the child's school medical records. These records were also marked as exhibits in the underlying litigation.

It is also undisputed that Joseph had been involved in a prior "mooning" prank on a school bus. Mrs. O'Connor did not witness that prank and became aware of it when she overheard several teachers describe the incident and also mention that they did not want to tell Joseph's father of the incident as he had a reputation for heavy handedness. This episode occurred just a few days before Joseph arrived at school with his black eye. In fact, his parents had been notified of the "mooning" incident and they had to appear at school for a meeting with the principal. It was following this meeting that young Joseph went to the nurse's office with the black eye.

By September 16, 1991, when young Nicholas arrived in school with his black eye, Mrs. O'Connor was now aware of

several incidents involving the Clark children. She was aware of the handprint on Joseph's face, Joseph's "mooning" incident followed closely by the black eye and now his youngest brother, Nicholas, arrived at school with a black eye. To add to this growing pattern, Nicholas gave almost an identical explanation to the nurse as his oldest brother had given just months earlier.

Based upon this collective group of undisputed events, Mrs. O'Connor concluded that a potential abusive situation might exist and she fulfilled her obligation by informing the new school principal, Sister Boychak, of this current event and all the past instances.

Such a conclusion by Mrs. O'Connor was surely reasonable under the circumstances. Faced with these circumstances, and mindful of her obligations to report potential abusive situations, the decision of Mrs. O'Connor to inform the school principal of the past and current events was objectively reasonable and no rational jury could find otherwise.

Furthermore, this was the first experience Mrs. O'Connor encountered in reporting a potential abusive situation to the school principal. It was not for her to investigate the details of this situation, that was left for the professional investigators of the Child Protection Service.

It is undisputed that Respondents did not examine and photograph the children. Any interview or examination was conducted by the investigator from CPS and Respondents were properly not a party nor present for that investigation.

Petitioners simply refuse to acknowledge that it was established that there was a *pattern* of instances and circumstances which formed the basis of the action taken by

Respondents. Perhaps Judge Brieant best recognized the importance of this ongoing pattern during oral argument when he observed that the latest incident of a black eye should be judged in light of the prior facts known or believed at the time. Judge Brieant correctly grasped the situation in stating *"its like the story of Robinson Crusoe. When they found a second footprint, they were pretty sure there was a human being on the island."*

The lower courts were correct in determining that no significant issues of disputed material facts existed and correctly dismissed the claim. Judge Brieant properly focused on the main issue of the constitutional claims which alleged that the report of the Respondents was undertaken without just cause or with gross negligence or in bad faith and without adequate training. It is obvious from the decision of Judge Brieant that the court took the time to review the large submission of papers as well as the numerous deposition transcripts which were provided.

Respondents had reasonable cause to suspect child abuse based upon the prior knowledge of previous instances either though personal knowledge or through verified hearsay concerning the Clark children. While each episode may not have been perceived, in and of itself, as a basis to support a report, it was the *cumulative* knowledge of these various instances which could not be ignored. It was this very *pattern* which supported the finding of reasonable cause.

Judge Brieant also correctly noted that there were other incidents involving the oldest child, Joseph, based upon deposition testimony of teachers concerning poor behavior at school and poor grades and noted that the "mooning" incident merely added to the pattern of behavior which is generally perceived as consistent with neglect or child abuse.

Reasonable cause had been described as a situation where a

reasonable person either observes or is made aware of an incident *where it is possible* that such an injury was caused by non-accidental means. Based upon the pattern associated with the Clark children it was quite reasonable to conclude that these similar injuries might *not have been* caused by accidentally playing with a "cousin from Staten Island". It is also beyond comprehension that the acts of the Respondents could be viewed as either wilful misconduct and/or gross negligence.

Child abuse and neglect are unfortunate and despicable acts which appear to be prevalent in our current society. New York has an obligation to safeguard the interests and the welfare of children, who due to their tender age and lack of sophistication have no ability or limited ability to protect themselves. Children have no real voice or champion to protect them from parental abuse. New York is not a minority in enacting such legislation consistent with the Social Services Laws designed to protect children from such abuse or neglect.

Those important public policy considerations far outweigh, and must outweigh, any rights of parents to be protected from legitimate inquiries by the Child Protective Services based upon reasonable reports initiated by school officials. New York wisely identified numerous professions which could normally be expected to come in contact with children and be in a position to observe a child and hopefully identify an abusive or neglectful situation as early as possible. Neither the legislation nor the decisional law of New York require a mandated reporter to independently investigate or verify their suspicions. New York wisely left that process to the expert professionals associated with the Child Protective Services agency.

Respondents, designated as mandated reporters of potential abuse, are placed in a very delicate and difficult situation. They *must report* their suspicions of abusive situations and they may

be held criminally and civilly *liable* if they fail to report such suspicions. This requirement subjects these mandated reporters to scrutiny always based upon hindsight. If a mandated reporter fails to report a close situation then that individual might be subjected to civil and criminal liability if facts later determine that an abusive situation actually existed.

Likewise, a mandated reporter may face civil rights litigation and accusations if the basis of the report is later determined to be unfounded as in this case. To permit such civil rights claims against Respondents will have a chilling effect on the future decisions of mandated reporters and tend to dilute the importance of valuable legislation which is designed to identify, treat and hopefully salvage a young life.

Based upon the facts and circumstances and evidence brought before the District Court, Judge Brieant correctly concluded that there was absolutely no material issues of fact to be resolved and that it was quite proper to dismiss the complaint. Likewise, the Second Circuit Court of Appeals appropriately and unanimously affirmed.

CONCLUSION

Petitioners' Writ of Certiorari should be denied.

Respectfully submitted,

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